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IN THE

Supreme Court of the United States

MORRIS COMMUNICATION COMPANY, LLC,
Petitioner,

v.

PGA TOUR, INC.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an entity can expand the carefully circumscribed protections that Congress provided in the Copyright Act, 17 U.S.C. § 101, *et seq.*, and assert exclusive control of public domain facts simply by including "copyright-like" restrictions in a standard form contract.

2. Whether, under Section 2 of the Sherman Act, 15 U.S.C. § 2, articulation of a non-pretextual business justification is an absolute defense to liability that obviates any need to assess the relative harms and benefits to overall consumer welfare resulting from challenged conduct.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties before the United States Court of Appeals for the Eleventh Circuit.

Morris Communication Company, LLC (formerly Morris Communications Corp.) was the appellant below. The appellee below was PGA Tour, Inc.

Pursuant to Rule 29.6, Petitioner states that Shibers Trading & Operating Co. is the parent company of Morris Communication Company, LLC. Shibers Trading & Operating Co. and Morris Communication Company, LLC have not issued any shares to the public, and thus no publicly traded company owns 10% or more of the publicly traded stock in Morris Communication Company, LLC.

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PETITION FOR A WRIT OF CERTIORARI

Morris Communication Company, LLC (formerly Morris Communications Corp.) ("Morris") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The opinion of the court of appeals is reported at 364 F.3d 1288 and is reprinted in the Appendix at Pet. App. 1a-18a. The denial of the petition for rehearing and rehearing *en banc* is reprinted in the Appendix at Pet. App. 53a-54a. The district court's opinion is reported at 235 F.Supp.2d 1269 and is reprinted in the Appendix at Pet. App. 19a-52a.

JURISDICTION

The court of appeals entered its judgment on March 31, 2004. Morris filed a timely petition for rehearing and rehearing en banc on April 21, 2004. The court of appeals denied Morris's petitions on May 28, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves Section 2 of the Sherman Act, 15 U.S.C. § 2, along with provisions of the Copyright Act, 17 U.S.C. § 101, *et seq.* The pertinent provisions are reproduced in the Appendix at Pet. App. 55a-57a.

STATEMENT OF THE CASE

In this case, the Eleventh Circuit held that the PGA Tour's interest in preventing "free riding" insulates it from antitrust liability for imposing severe restrictions on the time and manner in which the media can disseminate a compilation of facts – here golf scores – that are outside the protection of the copyright laws and are part of the public

domain. In so holding, the Eleventh Circuit's decision deepened an existing conflict regarding the ability of private parties to circumvent the federal copyright laws by adopting "copyright-like" restrictions in form contracts. Moreover, the Eleventh Circuit created a square conflict with the D.C. Circuit's decision in *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (en banc), regarding the need to examine the impact of a monopolist's challenged conduct on competition when assessing liability under § 2 of the Sherman Act.

The Eleventh Circuit's decision is a dangerous precedent. It upholds the PGA's claim of a monopoly over the raw facts of real-time golf scores, thereby raising the price consumers pay for access to such scores and denying consumers access to those scores whenever the PGA sees fit not to disseminate them. More fundamentally, the Eleventh Circuit has invoked the dubious principle that a party can use state contract law to create "copyright-like" restrictions on facts contained in compilations (such as telephone directories) and extended it to the realm of pure news. The decision allows newsmakers to use state law to monopolize – and thus to limit or even suppress – the dissemination of newsworthy facts that belong in the public domain. The decision thereby threatens the important national interest in the free exchange of information and ideas – an interest the copyright laws are designed to promote. The ruling will embolden corporations, unions, and other newsmakers to monopolize public domain information and will threaten the media's freedom to disseminate that information according to its best judgment. That result is particularly troubling because the decision seeks to redefine the rules of news publication on the Internet, just as media organizations are starting to tap

the vast potential of that medium. The Court should thus grant review in this case.

A. Factual Background

1. The PGA and the compilation of real-time scores.

Respondent PGA Tour, Inc. ("PGA") sponsors and promotes the PGA Tour, a series of professional golf tournaments throughout North America. In 1999, PGA's total direct revenues from championship golf – including principally revenues from television and tournaments – exceeded $300 million. Pet. App. 25a.[1]

Unlike a professional baseball or basketball game in which the action occurs entirely within the view of all who attend the event, a PGA golf tournament takes place on a golf course that spans 150 acres or more and play occurs across the entire course simultaneously. Spectators, television viewers, and reporters thus cannot observe all of the live action at once. In order to "enhanc[e] the on-site scoreboard for live spectators and for television broadcasters," Pet. App. 25a, the PGA compiles scoring information on all of the golfers in the tournament through a Real-Time Scoring System ("RTSS").

The RTSS operates in a straightforward manner. During a PGA tournament, volunteers follow each group of golfers on the course and tabulate the scores for each player at the end of each hole. Other volunteers located at each of the 18 holes then relay those scores by handheld wireless devices to a remote production truck staffed by PGA personnel, who compile the scores.

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[1] Because this case was resolved on summary judgment, all evidence is construed in the light most favorable to Morris.

Once compiled, the scores are sent to the tournament's on-site media center where accredited media representatives are allowed access to them. At the same time, the scores are sent to "leaderboards" on the golf course for viewing by spectators. The PGA also transmits the information for publication on the PGA's own Internet website (www.pgatour.com). Pet. App. 2a.

PGA rules prevent anyone other than the PGA itself from using telephones or wireless devices on the golf course, making it impossible for media organizations (or anyone else) to duplicate, improve upon, or compete directly with the PGA's own scoring system. Pet. App. 3a.

2. PGA's restrictions on syndication of real-time scores.

Petitioner Morris Communications Corp. ("Morris") is a national media corporation that owns more than 35 radio stations and nearly 40 newspapers, including the Augusta Chronicle. In 1996, as part of its coverage of the Masters golf tournament – a non-PGA event played annually at Augusta National Golf Club – Morris became the first media company to publish complete, real-time golf scores on the Internet.

Beginning in 1999, Morris sought to extend its real-time scoring to other golf tournaments, including those run by the PGA. At the PGA events, Morris's reporters in the media center observed the displayed scores, verified their accuracy, manually re-keyed the scores into Morris's proprietary computer system, and transmitted the information through dedicated telephone lines to Morris's servers. Morris then made the scores available in real time on its own website and to commercial partners. Pet. App. 25a-26a.

Viewing Morris and other media companies as a threat to its own efforts to publish and sell real-time golf scores on line, the PGA imposed a series of restrictions on all media organizations seeking credentials to cover the tournaments. In April 1999, the PGA adopted Online Service Regulations ("OLSR") that required all media organizations to delay publication of the scoring information on their own websites until the earlier of (i) 30 minutes after the shot, or (ii) the time when the information appears on the PGA's own website. In January 2000, the PGA amended the OLSR to prohibit any syndication of the compiled scoring information to a non-credentialed Internet website without a license from the PGA. These restrictions gave the PGA total control over the distribution of purely factual information, namely, real-time golf scores.[2]

The PGA's restrictions had a predictable and devastating effect on competition in the dissemination of real-time scoring information. The PGA Tour was able to raise its price for real-time golf scores in its syndication agreements despite the fact that the agreements were no longer exclusive and thus of less value. Pet. App. 30a. At the same time, the value of Morris's syndication agreements fell by more than 65% after the OLSR went into effect. *Id.* Moreover, when the PGA did not publish real-time scores at a particular event, those scores were simply unavailable to consumers. *Id.* at 32a.

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[2] After the district court's judgment, the PGA further limited the dissemination of scoring information by imposing restrictions – so-called "terms of service" – that prohibit anyone from using the information displayed on www.pgatour.com for a commercial purpose. Pet. App. 5a. Those restrictions are not at issue here.

B. Proceedings Below

Morris brought an action in federal district court alleging that the PGA's imposition of the OLSR constituted unlawful monopolization in violation of § 2 of the Sherman Act. Recognizing that the PGA's OLSR "have the purpose and effect of giving the PGA Tour a commercial advantage," Pet. App. 31a, the district court focused its attention on whether the PGA could articulate a valid business justification for imposing its admittedly exclusionary restrictions. In the district court's view, if the PGA were able to provide a non-pretextual business justification, the PGA would have a complete defense to the antitrust allegations, regardless of the effect of the restrictions on consumer welfare or competition. *Id.* at 51a.

The district court then turned to the PGA's proffered justification, namely, that the OLSR protected the PGA's asserted "property right in the scores that it compiled by use of RTSS," and prevented Morris from "free-riding" by making use of the scores that PGA had compiled. Pet. App. 39a.

Morris contended that the PGA's business justification was insufficient as a matter of law because "the PGA Tour lacks a property right in the score." Pet. App. 39a. The district court rejected Morris's argument, holding that "the PGA Tour *does* have a property right in the scores compiled by use of RTSS." *Id.* (emphasis added). The court acknowledged that this Court's decision in *Feist Publications, Inc. v. Rural Telephone Service, Co.*, 499 U.S. 340 (1991), precluded any argument that the PGA had a copyright in the golf scores. The court nevertheless concluded that "the PGA tour controls the right of access to that information and can place restrictions on those attending

the private event, giving the PGA Tour a property right that the Court will protect." *Id.* at 39a.

The district court relied on the Seventh Circuit's decision in *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996). There, the court of appeals had held that *Feist* did not preempt efforts by a producer of a CD ROM containing nationwide telephone listings to limit copying of the information in its CD ROM by including anti-copying restrictions in a form contract printed on shrink-wrap around the software. Following the Seventh Circuit's lead, the district court concluded that, notwithstanding *Feist*, "a compiler of information can limit the dissemination of that information through contracts, including contracts found on tickets." Pet. App. 36a n.19.

Having found that the PGA had a valid business justification, the district court then granted summary judgment to the PGA and dismissed Morris's antitrust claims without any consideration of the overall effect of the PGA's restrictions on consumer welfare and competition.

Morris appealed. Like the district court, the Eleventh Circuit held that a non-pretextual justification standing alone would defeat Morris's antitrust claims. Pet. App. 11a ("Morris's § 2 claims cannot prevail because [the] PGA has a valid business justification for its actions."). Thus, like the district court, the Eleventh Circuit believed it irrelevant whether, on balance, the PGA's restrictions harmed or benefited competition and consumer welfare. It was enough, in the Eleventh Circuit's view, that the PGA had a non-pretextual business reason for imposing the restrictions.

The Eleventh Circuit then turned to the PGA's interest in restricting access to the scores. Supported by a coalition of media organizations as *amici curiae*, Morris contended that

granting the PGA exclusive control of the golf scores circumvented – and was therefore preempted by – the copyright laws as explicated in *Feist*. The Eleventh Circuit rejected that argument with the cursory statement that "[c]ontrary to the arguments of Morris and its *amici curiae*, this case is not about copyright law." Pet. App. 6a.

Having summarily discarded the principal argument *against* the PGA's exclusive control over the scores, the Eleventh Circuit unsurprisingly found that such control was justified. Thus, despite *Feist*'s holding that compiled facts are generally "part of the public domain available to every person," *Feist*, 499 U.S. at 348 (internal quotation marks and citation omitted), the court of appeals agreed with the district court that the PGA could prevent use of its compiled real-time golf scores, just as any other monopolist could protect its investment in other products. Indeed, the court went so far as to *equate* the PGA's purported rights in this information with federal copyright protection, holding that "PGA 'has a right to sell or license its product, championship golf, and its derivative product, [compiled] golf scores, on the Internet in the same way that the [PGA] currently sells its right to television broadcasting stations" – even though the PGA has a copyright in the broadcast of tour events but cannot lawfully claim copyright in the "raw facts" of the golf scores. *Id.* at 13a (quoting *id.* at 42a-43a).

REASONS FOR GRANTING THE PETITION

This case arises at the intersection of the nation's intellectual property and antitrust laws, and presents issues of exceptional legal and practical importance. In the decision below, the Eleventh Circuit held that the PGA's interest in preventing "free riding" justified contractual restrictions designed to preserve the PGA's monopoly control over

certain public domain facts – real-time golf scores – and that the assertion of this interest defeated any claim under the Sherman Act. The Eleventh Circuit's rulings conflict directly with decisions of other courts of appeals, and they reflect a misunderstanding of the significance of so-called "free riding" under both intellectual property law and antitrust law.

There is no copyright in "raw facts" because Congress made a deliberate policy choice that facts must be in the public domain and free for all to use – even if a party has invested labor to compile those facts. *Feist*, 499 U.S. at 348. Thus, there should be no state law right to prevent "free riding" on the compilation of raw facts (or other public domain information) because the copyright laws preempt any such purported right. A monopolist's attempt to assert such a right cannot, therefore, justify otherwise anticompetitive conduct under § 2 of the Sherman Act. And this case is a perfectly appropriate vehicle for deciding the copyright preemption issue. Antitrust cases often require an evaluation of the legitimacy of a defendant's asserted intellectual property rights. Moreover, as it arises in this case, the copyright preemption issue is identical to the issue as it arises in a variety of contexts, from claims of copyright infringement, to breach of contract cases, to state tort or unfair competition actions (*see* page 16 *infra*).

In all events, merely asserting a business justification – particularly one aimed at the prevention of "free riding" – is not enough to defeat a § 2 claim. It is well established that "past innovations and existing information are so-called public goods whose further use entails no incremental resource cost to society. Preventing free riding on such innovations or information or requiring payment for using them would thus be inefficient and would impair consumer

welfare." VIII Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law, ¶ 1613b, at 153 (2d ed. 2003). A proffered justification suffices only if its procompetitive effects outweigh its anticompetitive effects – an analysis the Eleventh Circuit failed to undertake.

Because the practical effects of the Eleventh Circuit's decision, and the principles it represents, are so wide-reaching, and the issues raised in this case are so important, the petition for certiorari should be granted.

I. This Court Should Decide Whether Parties Can Expand The Carefully Circumscribed Protections That Congress Provided In The Copyright Act By Including Additional Restrictions In A Standard Form Contract.

A. The Decision Below Deepens a Recognized Conflict.

The Eleventh Circuit upheld restrictions imposed by the PGA in a form contract that purported to limit the ability of media organizations such as Morris to distribute purely factual information – real-time golf scores – over the Internet. The Eleventh Circuit did so despite this Court's holding in *Feist* that Congress *excluded* such information from the copyright laws to ensure that "raw facts" remain "part of the public domain available to every person," *Feist*, 499 U.S. at 348 (internal quotation marks and citation omitted), and "may be copied at will," *id.* at 350. The Eleventh Circuit's decision, although consistent with decisions of the Seventh Circuit and the Federal Circuit, is flatly inconsistent with decisions of the Fifth Circuit and the Second Circuit holding that the copyright laws preempt form contracts that purport to expand the protections created by those laws.

In *Feist*, Rural Telephone Service, a telephone utility that published a local telephone directory, alleged that Feist Publications infringed Rural's copyright by copying listings from Rural's white pages without permission. This Court held that Feist's use of Rural's white page listings did not constitute infringement, as Rural's white page listings did "not meet the constitutional or statutory requirements for copyright protection." 499 U.S. at 341. The Court stated that "there is nothing original in Rural's white pages. The raw data are uncopyrightable facts." *Id.*

Feist embraced the "fundamental axiom" that "all facts – scientific, historical, biographical, and news of the day . . . . may not be copyrighted and are part of the public domain of every person." 499 U.S. at 341, 348 (citations omitted). That holding does more than merely preclude assertions of copyright in compilations of "raw facts." *Feist* establishes that Congress has affirmatively chosen to leave facts in the public domain to promote the free flow of information and ideas. That the petitioner in *Feist* was effectively "free riding" on the efforts of others who had compiled those raw facts was, the Court held, "neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art." *Id.* at 350. In short, "raw facts may be copied at will," regardless of the labor expended in compiling them. *Id.*

The Eleventh Circuit nevertheless held that the PGA had exclusive control over the "raw facts" of real-time golf scores and could claim a legitimate business justification in preventing the purported "free riding" of others on its efforts to compile and disseminate those scores. The appeals court thus permitted the PGA to use a private form contract (*i.e.*, the media credentials) to impose "copyright-like" protections – monopoly control over the distribution and dissemination

of materials – to materials Congress deliberately excluded from copyright protection.

That decision deepens an existing circuit conflict as to the preemptive scope of the Copyright Act with respect to private form contracts – essentially contracts of adhesion – that provide "copyright-like" protections exceeding those authorized by Congress in the Copyright Act.

At least since Judge Learned Hand's decision in *RCA Manufacturing Co. v. Whiteman*, 114 F.2d 86 (2d Cir. 1940), the Second Circuit has held that state contract law cannot create copyright protection over material that Congress has determined is part of the public domain. In that case, RCA attempted to prohibit radio stations from broadcasting its records by printing on the record: "Not Licensed for Radio Broadcast." *Id.* at 87. At that time, the Copyright Act did not extend protection to performance of recordings. Writing for a unanimous panel, Judge Hand held that RCA could not use contract terms to grant itself copyright protection when Congress had denied it. Indeed, Judge Hand noted that, if RCA's approach were lawful, "it would be possible . . . to have the advantage of dissemination of the work at large, and to retain a perpetual, though partial, monopoly in it. That is contrary to the whole policy of the Copyright Act and of the Constitution." *Id.* at 89. *Cf. National Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841 (2d Cir. 1997) (rejecting NBA's effort to prevent pager company from gathering scores from NBA broadcasts, keying that information into pager company's computer, and then distributing the information in real-time to customers).

The Fifth Circuit's decision in *Vault Corp. v. Quaid Software Limited*, 847 F.2d 255 (5th Cir. 1988), is to the same effect. Vault produced computer diskettes designed to

prevent the unauthorized duplication of programs placed on them by software companies. In each package containing its software, Vault included a license agreement that, *inter alia*, forever prohibited anyone purchasing the software from decompiling or disassembling any of the software programs on the Vault diskettes. Such a contractual restriction was expressly permitted under the Louisiana Software License Enforcement Act. Quaid, a producer of a program designed to defeat Vault's anticopying software, nevertheless decompiled and disassembled Vault's program in violation of the licensing agreement. Vault sued for, among other things, breach of the licensing agreement.

Citing this Court's decisions in *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 230-31 (1964), and *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234, 237-38 (1964), the Fifth Circuit refused to enforce the licensing agreement. The court noted that several of the provisions authorized under the Louisiana statute and included in the license agreement were directly contrary to the Copyright Act. For example, the agreement prohibited all copying, while the Copyright Act permitted archival copying and other copying; and the agreement established a perpetual limitation, while the Copyright Act (as it then read) limited its protections to the author's life plus 50 years. The Fifth Circuit thus concluded that the relevant provisions of the Louisiana Act were "preempted by federal law" and that "the restriction in Vault's license agreement against decompilation or disassembly is unenforceable." 847 F.2d at 270. There is little doubt, then, that in the Second Circuit and the Fifth Circuit, the PGA's effort to extend "copyright-like" protections to golf scores would be invalidated.

The Eleventh Circuit's decision is consistent, however, with decisions of two other Circuits. In *ProCD, Inc. v.*

Zeidenberg, 86 F.3d 1447 (7th Cir. 1996), the plaintiff produced a CD ROM containing nationwide telephone listings. The product included a license printed on the shrinkwrap enclosing the CD ROM that limited use of the software to non-commercial purposes. Defendant nevertheless copied the information contained in the database, composed its own software to access the listings, and made the listings available on the Internet. The Seventh Circuit held that the license agreement was an enforceable contract, and that the software company's contract claim was not preempted by the Copyright Act.

The Federal Circuit (applying First Circuit law) reached the same result in *Bowers v. Baystate Technologies, Inc.*, 320 F.3d 1317 (Fed. Cir. 2003), *cert. denied*, 539 U.S. 928 (2003), albeit over a persuasive dissent by Judge Dyk. In *Bowers*, a shrinkwrap license on plaintiff's computer program flatly prohibited any "reverse engineering." Notwithstanding binding precedent that such "reverse engineering" constituted "fair use" under the Copyright Act, *id.* at 1325, the majority relied heavily on the Seventh Circuit's decision in *ProCD* and held that the Act did not preempt the contract, *id.* at 1325-26.

Judge Dyk dissented. Like the majority, Judge Dyk recognized that, under this Court's decision in *Bonito Boats*, "[a] state is not free to eliminate the fair use defense." 320 F.3d at 1336 (Dyk, J., dissenting). He also agreed that, if the contract were "freely negotiated," a "state could permit parties to contract away a fair use defense." *Id.* at 1336-37. Unlike the majority, however, Judge Dyk concluded that a state is *not* permitted to allow the use of a shrinkwrap license or any other contract of adhesion to "give[] the copyright holder the ability to eliminate the fair use defense in each and every instance at its option," because that would "allow

state law [to] extensively undermine the protections of the Copyright Act." *Id.* at 1337.

Critically for present purposes, Judge Dyk observed that the majority's decision was flatly inconsistent with the Fifth Circuit's decision in *Vault*, and that *Vault* "directly supports preemption of the shrinkwrap limitation." *Id.*

Nor is Judge Dyk alone in his observation. Numerous commentators have recognized that *RCA* and *Vault* conflict squarely with *ProCD* and its progeny. *See, e.g.,* Mark A. Lemley, *Beyond Preemption: The Law and Policy of Intellectual Property Licensing*, 87 Cal. L. Rev. 111, 143 (1999); Deanna L. Kwong, *The Copyright-Contract Intersection:* Softman Products, Co. v. Adobe Systems, Inc. & Bowers v. Baystate Technologies, Inc., 18 Berkeley Tech. L.J. 349, 361 (2003).[3]

To be sure, the Eleventh Circuit's decision arises in the context of an antitrust action, not a direct copyright action. But whether the underlying action is a claim of copyright infringement (as in *Vault*), a breach of contract claim (as in *ProCD* and *Bowers*), a claim for invasion of a common-law property right (as in *RCA*), or an antitrust claim (as here), the dispositive question in each case is the same: whether a

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[3] This same confusion is reflected in the decisions of the district courts. *Compare, e.g., Information Handling Servs., Inc. v. LRP Publications, Inc.*, No. Civ. A. 00-1859, 2000 WL 433998, at *2 (E.D. Pa. Apr. 18, 2000) (noting that "it is questionable whether . . . licenses, which are not the product of any bargaining, should be permitted effectively to expand copyright protection to information that is not copyrightable in the first instance"), *with Matthew Bender & Co. v. Jurisline.Com LLC*, 91 F. Supp. 2d 677, 678 (S.D.N.Y. 2000) (relying on *ProCD* and holding that breach of contract claim was not preempted by the Copyright Act).

private party can create a valid and enforceable "copyright-like" right by the simple expedient of including such restrictions in a form contract.[4] The Eleventh Circuit held that the PGA could do precisely that, and it thus concluded that Morris had no right to publish the information. If this case were in the Second Circuit or the Fifth Circuit, however, the Copyright Act would have preempted the PGA's effort to restrict dissemination of "raw facts," and the PGA's asserted business justification would have failed, thereby eliminating the basis on which it obtained summary judgment. Indeed, it is common for issues respecting the legitimate scope of intellectual property rights to arise in the context of evaluating defenses to § 2 claims. *See Microsoft*, 253 F.3d at 63; *In re Independent Serv. Orgs. Antitrust Litig.*, 203 F.3d 1322, 1325 (Fed. Cir. 2000); 1 Herbert Hovenkamp et al., *IP and Antitrust: An Analysis of Antitrust Principles Applied to Intellectual Property Law* §13.3(b) at 13-11 (2004 Supp.). That is hardly surprising. Intellectual property rights are state-sanctioned monopolies, and attempts to extend their scope beyond what the law allows routinely gives rise to claims of anticompetitive conduct.

In short, there is a direct split among the courts of appeals regarding the enforceability of contractual restrictions contained in form contracts that effectively expand or otherwise modify the rights and limitations that

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[4] In *Lasercomb America, Inc. v. Reynolds*, 911 F.2d 970 (4th Cir. 1990), the same issue arose in the context of a "copyright misuse" defense. *See id.* at 978 (finding "copyright misuse" in a standard licensing agreement prohibiting any attempt by a licensee to independently implement the idea expressed in the software's source code for a period of 99 years, thereby depriving the public of the "creative abilities" of a licensee's employees "in a manner adverse to the public policy embodied in copyright law").

Congress established in the Copyright Act, and the Eleventh Circuit's decision deepens that split.

B. The Decision Conflicts with Decisions of this Court.

The Eleventh Circuit's decision also warrants review because it is irreconcilable with decisions of this Court, especially *Feist*. The Eleventh Circuit's approval of the PGA's business justification defense was predicated upon its conclusion that the PGA could assert exclusive control over the dissemination of real-time golf scores. *See, e.g.*, Pet. App. 13a ("PGA 'has a right to sell or license . . . [compiled] golf scores . . . on the Internet in the same way the [PGA] currently sells its rights to television broadcasting stations.'") (brackets in original; omissions added).

In reaching that conclusion, the Eleventh Circuit blinded itself to the intellectual property issues presented by the PGA's proffered business justification defense, insisting that the case was "not about copyright law." Pet. App. 6a. That is wrong. As Morris and its *amici* argued, this Court's intellectual property decisions flatly prohibit the Eleventh Circuit's conclusion because the PGA was not entitled to protect its investment in real-time golf scores in the same way that a monopolist might protect its investment in some other product.

In *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989), the Court addressed a state statute that prohibited the copying of certain boat hulls even though the hull design was not subject to a federal patent. The Court unanimously held that the statute was preempted. The Court stated that the state statute "allows petitioner to reassert a substantial property right in the idea, thereby constricting the spectrum of useful public knowledge. Moreover, it does so without the careful protections of high standards of

innovation and limited monopoly contained in the federal scheme." 489 U.S. at 159. Accordingly, this Court held that the statute "conflicts with the federal policy 'that all ideas in general circulation be dedicated to the common good'" unless protected by federal law, and is thus preempted. *Id.* at 159-60 (citation omitted).

In so holding, the Court followed settled precedent preempting state efforts to vest private entities with exclusive control over information that Congress has determined is in the public domain. In *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964), for example, the Court held that federal law preempted state unfair competition law allowing a competitor to sue in tort for copying an item that was "protected by neither a federal patent nor a copyright." *Id.* at 225; *see also id.* at 232-33. The Court concluded that States "cannot separately make effectual provision" for patents or copyrights, *id.* at 228 (quoting The Federalist No. 43 (James Madison)), and thus "[w]hen state law touches upon the area of these federal statutes, it is 'familiar doctrine' that the federal policy 'may not be set at naught, or its benefits denied' by the state law." *Sears*, 376 U.S. at 229 (quoting *Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U.S. 172, 173 (1942)).

The Court reached the same result in *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964), holding that federal law preempted the extension of state unfair competition law to the functional aspects of an unpatented lighting system. The Court stated that any injunction prohibiting copying "interfere[d] with the federal policy found in Art. I, § 8, cl. 8 of the Constitution and in the implementing federal statutes, of allowing free access to copy whatever the federal patent and copyright laws leave in the public domain." 376 U.S. at 237; *see also Brulotte v.*

Thys Co., 379 U.S. 29, 33 (1964) (license agreement that exacted royalties beyond expiration of patent was unenforceable as the expired patent had "entered the public domain").

The Eleventh Circuit's decision ignores these precedents and reflects a fundamental misunderstanding of the relevance of federal copyright law to Morris's claims. The Eleventh Circuit correctly recognized that the PGA's right to control the scores could not be grounded in copyright law because "copyright law does not protect factual information." Pet. App. 17a n.15; *see id.* at 6a n.6. But that should have been the beginning not the end of the analysis. Under *Bonito Boats*, *Sears*, and *Compco*, the Eleventh Circuit needed to consider whether the copyright laws reflected an affirmative decision by Congress to preempt state efforts to recognize such control under state law. *Cf.* XII Herbert Hovenkamp, *Antitrust Law*, ¶ 2032, at 185 (1999) (noting that "the intellectual property laws are designed to identify the forms of innovation that are to be protected from free riding and the forms that are not"). Had the court of appeals done so, it could not have reached the decision it did.

Nor can the decision of the Eleventh Circuit be justified on the grounds that the PGA's asserted right arose from contract – or more precisely from restrictions placed in the standard media credentials – rather than from a state statute. As Judge Dyk noted in his *Bowers* dissent, the fact that the state common law of contracts rather than a state statute creates the right cannot be the deciding factor, because "the preemption clause of the Copyright Act makes clear that it covers 'any such right or equivalent right in any such work *under the common law or statutes of any State*.'" 320 F.3d at 1337 (quoting 17 U.S.C. § 301(a)) (emphasis in Judge Dyk's dissent). The Second Circuit and the Fifth Circuit

both also recognized that permitting an organization to impose "copyright-like" restrictions by form contract would undermine Congress' judgment that the public interest is best served by the free flow of factual information.

Moreover, the Eleventh Circuit has adopted a rule of law flatly contrary to this Court's decision in *Feist*. As the leading authority on copyright law has stated, *ProCD* "undid the protection that *Feist* conferred" – the ability to copy facts without liability. 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 3.04[B][3][a], at 3-34.3 to 3-34.4 (2004). By allowing a form license agreement to bar the dissemination of uncopyrightable materials, the Seventh Circuit's decision in *ProCD* creates an "impermissible end-run around *Feist*." *Id.* at 3-34.3. *ProCD* itself, after all, involved the very data – telephone listings – that this Court held in *Feist* to be in the public domain. Yet by the simple expedient of distributing the listings wrapped in plastic pre-printed with restrictions on copying, the telephone company got precisely the same rights that this Court denied it in *Feist*. If the Eleventh Circuit, the Seventh Circuit, and the Federal Circuit majority are correct, then *Feist* is a dead letter.

Indeed, as Judge Dyk correctly observed, the approach adopted by the Federal Circuit majority and the Eleventh Circuit here has "no logical stopping point." 320 F.3d at 1337. "If by printing a few words on the outside of its product a party can eliminate the fair use defense, then it can also, by the same means, restrict a purchaser from asserting the 'first sale' defense . . . or any other of the protections Congress has afforded the public in the Copyright Act. That means that, under the majority's reasoning, state law could extensively undermine the protections of the Copyright Act."

Id. As the Eleventh Circuit's decision below makes clear, Judge Dyk was prescient.

C. Review of the Eleventh Circuit's Decision Is Urgently Needed.

By extending the logic of the Seventh Circuit's *Pro-CD* decision to the realm of newsworthy "raw facts," the Eleventh Circuit's decision threatens bedrock interests in the free exchange of information. Under the Eleventh Circuit's decision, facts about newsworthy events are the exclusive property of the newsmaker, so long as the newsmaker can advance a state law basis for claiming a right to control access to those facts. A newsmaker thus has (in the Eleventh Circuit's view) a legitimate interest in restricting or even prohibiting the free flow of that information, and it can effectuate those restrictions simply by placing them unilaterally on its media credentials.

The risk to the media and the public is clear. Motivated by a desire for profit, by an effort to influence or suppress the coverage of news events, or by caprice, newsmakers would control the right of the media to report and the right of the public to receive unfiltered factual information about newsworthy events.

The PGA is not alone in its effort to control access to public domain information. In recent years, sporting organizations such as the NBA have sought to use intellectual property laws to restrict the ability of news organizations to disseminate scores and other information, particularly on the Internet. Major League Baseball teams have also attempted to limit the dissemination of photographs of baseball games. One college athletic conference actually imposed restrictions (since voluntarily removed) that purported to prevent media organizations from

posting any "statistics or game information" – whether for commercial purposes or not – until 30 minutes after the game concluded. Pet. App. 58a.

Nor is the impact of the Eleventh Circuit's decision limited to sporting events. The principle that the organizer of an event can limit by express contract the ability of the media (and everyone else) to use public domain information could easily justify control of information in circumstances as varied as a power struggle between rival factions or allegations of corruption at a national union convention, a shareholder protest at a public company's annual meeting, or the unveiling of a groundbreaking technology at an industry trade show. Likewise, the principle established in the Eleventh Circuit is in no way limited to situations where competitors seek to sell or otherwise profit from the use of raw facts, and would plainly extend to efforts merely to publish newsworthy facts. The state-law right recognized by the Eleventh Circuit would be enforceable irrespective of the motive of the person seeking to invade that right. If left in place, the Eleventh Circuit's decision will surely embolden other organizations and encourage further restrictions.

Moreover, the importance of the issues extends beyond the news arena. Decisions such as *ProCD* and the Eleventh Circuit's decision here give carte blanche to producers of uncopyrighted material to use contracts of adhesion – through media credentials, shrinkwrap, or other contracts – to extend their copyright. The potential for mischief in the software arena, where concepts of originality and fair use are central, is even greater and cries out for review.

Finally, a circuit conflict on this issue is intolerable. Morris and others who cover news and sporting events on the Internet do so nationwide, and the decision of what

events to cover should not depend on the fortuity of what judicial circuit a particular tournament happens to fall within. By the same token, software makers and purchasers operate nationwide. A system that allows the ability of fine print on shrinkwrap to expand or limit the rights provided by Congress in the Copyright Act to vary across the Country is unworkable.

II. The Eleventh Circuit's Truncated Analysis Under § 2 Of The Sherman Act Directly Conflicts With The D.C. Circuit's Decision In *United States v. Microsoft Corp.*, As Well As With Decisions From Other Courts Of Appeals, And Merits This Court's Review.

The Eleventh Circuit's application of § 2 of the Sherman Act also warrants review. The Eleventh Circuit held that a defendant's articulation of a non-pretextual business justification bars § 2 liability, regardless of the impact of the defendant's practices on competition and consumer welfare. That decision conflicts directly with the D.C. Circuit's unanimous, *en banc* decision in *Microsoft* and decisions from other circuits that mandate a broader inquiry into the competitive impact of the defendant's conduct.

The consequences of the Eleventh Circuit's departure are starkly presented here. Because of its truncated § 2 inquiry, the Eleventh Circuit wrongly accepted the defendant's "free-rider" justification where that justification is inapt, namely, where the alleged "free riding" did not reduce innovation by either plaintiff or defendant and the challenged restriction thus will impair consumer welfare. As a result, the Eleventh Circuit endorsed a business practice that was imposed with the specific intent and actual effect of eliminating competition, preserving monopoly, and generating higher

prices for consumers. The PGA's justification would not withstand scrutiny in the D.C. Circuit.

A. The Decision Below Creates a Conflict Among the Courts of Appeals.

The Eleventh Circuit's decision conflicts directly with the D.C. Circuit's *Microsoft* decision and decisions of other courts of appeals. A monopolization claim under § 2 of the Sherman Act contains two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). A firm violates § 2 when it has monopoly power in a relevant market and maintains that power by engaging in exclusionary or predatory conduct to "'foreclose competition, to gain a competitive advantage, or to destroy a competitor.'" *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 482-83 (1992) (quoting *United States v. Griffith*, 334 U.S. 100, 107 (1948)).

In this case, the Eleventh Circuit held that a defendant could defeat a § 2 claim merely by asserting a "valid business justification" for its behavior (Pet. App. 11a) – here, the contention that the PGA sought to prevent Morris from "free riding" on PGA's compilation of golf scores (*id.* at 12a). The Eleventh Circuit thus affirmed dismissal of Morris's antitrust claims without any consideration of the overall effect of the OLSR on competition and consumer welfare, notwithstanding the court's acknowledgement that the conduct "injures competition." *Id.* at 11a.

In so doing, the Eleventh Circuit placed itself in direct conflict with the *Microsoft* court. According to the D.C.

Circuit, "a century of case law on monopolization under § 2" demonstrates that courts adjudicating such cases must apply a balancing test to determine whether the Sherman Act has been violated. *Microsoft*, 253 F.3d at 58. Under this test, the assertion of a non-pretextual business justification for the challenged conduct does not end the court's inquiry, but instead shifts the burden to the plaintiff: "[I]f the monopolist's procompetitive justification stands unrebutted, then the plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit." *Id.* at 59; *see id.* (holding that court must determine "whether the monopolist's conduct on balance harms competition and is therefore condemned as exclusionary for the purposes of § 2").

That same approach – balancing the competitive harms and benefits once a defendant has articulated a legitimate non-pretextual business justification – has been applied in numerous other circuits. *See, e.g.*, *MetroNet Servs. Corp. v. U.S. West Communications*, 329 F.3d 986, 1007-08 (9th Cir. 2003) ("'[I]f the monopolist's procompetitive justification stands unrebutted, then the plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit.'") (quoting *Microsoft.*, 253 F.3d at 59), *vacated on other grounds sub nom. Qwest Corp. v. MetroNet Servs. Corp.*, 124 S. Ct. 1144 (2004); *Paschall v. Kansas City Star Co.*, 727 F.2d 692, 698, 704 (8th Cir. 1984) (en banc) (finding, in case alleging that defendant "refus[ed] to deal with would-be competitors," that defendant had asserted a legitimate business justification for its actions and concluding that "[o]n balance, . . . [plaintiffs] have not borne their burden . . . of proving that the procompetitive effects generated . . . are outweighed by the minimal anticompetitive effects of eliminating potential competition from the retail

market."); *Microsoft*, 253 F.3d at 59 (citing *Mid-Texas Communications Sys., Inc. v. AT&T*, 615 F.2d 1372, 1389 n.13 (5th Cir. 1980), and *Byars v. Bluff City News Co.*, 609 F.2d 843, 860 (6th Cir. 1979), for the proposition that "[i]t is clear ... that the analysis under section 2 is similar to that under section 1 regardless whether the rule of reason label is applied") (alterations in original).

Leading commentators have described the test for § 2 liability in the same way. *See, e.g.*, VII Areeda, *supra* ¶ 1512, at 442-44 (2d ed. 2003) (noting that the rule of reason that governs § 1 cases "closely resembles" the one applied in the context of § 2, and that, under both standards, "if both the potential harm and the social benefit are present, the two must be weighed against each other").

The Eleventh Circuit's conclusion that articulation of a non-pretextual business justification ends the § 2 analysis cannot be reconciled with this body of law and commentary.

B. The Decision Below Warrants Review.

The conflict in the circuits warrants review because the Eleventh Circuit distorted the proper focus of the Sherman Act inquiry and permitted conduct that impairs consumer welfare. As a result of the decision, the PGA was allowed to insulate its website from effective competition, leaving consumers to pay more for an inferior product.

As this Court has emphasized, the Sherman Act is a "consumer welfare prescription." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (quoting Robert H. Bork, *The Antitrust Paradox* 66 (1978)). Thus, an evaluation of whether conduct is exclusionary must include "the effect of the challenged pattern of conduct on consumers, on [the monopoiist's] smaller rival, and on [the monopolist] itself."

Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605 (1985); *see also Microsoft*, 253 F.3d at 58-59. The consumer-welfare effects of the defendant's conduct are not, as the Eleventh Circuit believed, ancillary to the § 2 inquiry – they are the crux of that inquiry. Moreover, the Eleventh Circuit's acceptance of non-pretextual business justifications as dispositive of the § 2 analysis erects nearly insuperable barriers to Sherman Act claims.

The potential for mischief inherent in the Eleventh Circuit's approach is evident here. The Eleventh Circuit accepted as dispositive the PGA's contention that its on-line service restrictions were necessary to prevent free riding. But as the Areeda and Hovenkamp treatise makes clear, "free riding is not considered an unqualified evil that warrants redress," and "whether uncompensated free riders prevent a desirable amount of an activity is an empirical question." VIII Areeda, *supra*, ¶ 1613, at 155 (2d ed. 2004). The courts of appeals have routinely rejected free-rider defenses when elimination of the alleged free riding would not benefit consumers, *see, e.g.*, *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 937-38 (7th Cir. 2000) (Wood, J.); *Premier Electrical Construction Co. v. National Electrical Contractors Ass'n*, 814 F.2d 358, 369 (7th Cir. 1987) (Easterbrook, J), and this Court has done the same, *see, e.g.*, *Eastman Kodak Co.*, 504 U.S. at 485-86 (defendant not entitled to summary judgment despite claim that plaintiffs were free riding on defendant's investment).

The Eleventh Circuit's failure to conduct a careful contextual analysis to determine the impact of the alleged free riding on consumer welfare led the court to accept a free-riding defense where it was inappropriate. At the outset, skepticism toward free riding as a valid business justification is particularly warranted here because "the intellectual

property laws are designed to identify the forms of innovation that are to be protected from free riding and the forms that are not." XII Hovenkamp, *supra*, ¶ 2032, at 185. The PGA's claim of "free riding" is simply an effort to eliminate competition by exerting monopoly control over information in the public domain. But regulation of access to "raw facts" is for the copyright laws, and Congress has made the judgment that "free riding" on such facts is to be encouraged, not foreclosed.

Moreover, as this Court has noted, a desire to prevent free riding can justify otherwise exclusionary restrictions only when those restrictions are necessary to ensure a level of "investment of capital and labor" that would improve consumer welfare, *Eastman Kodak Co.*, 504 U.S. at 485 n.33 – that is, when the failure to prevent free riding will deter investment and thus harm consumers. Because the Eleventh Circuit stopped its analysis once the PGA asserted that it wanted to prevent free riding, the court never considered whether preventing free riding would benefit consumers, rather than just the PGA.

The Eleventh Circuit's failure in this regard is particularly troubling because the PGA's free-riding defense could not justify the grant of summary judgment. The evidence demonstrated, for example, that elimination of the OLSR would create no disincentive to maintain and refine the RTSS. As the PGA's Commissioner testified, real-time scores have become an "essential" part of putting on a golf tournament, *see* Dist. Ct. Rec. Doc. #126-12 at 15209, and the record also shows that such scoring is prevalent throughout the world of professional golf. On-site spectators and even the golfers themselves now expect real-time scores to be available on electronic scoreboards located throughout the golf course, and television viewers similarly expect

accurate real-time scores. In light of these expectations, the PGA has every incentive to improve and develop its scoring systems. That is especially true given that, in 1999, the PGA's core business of promoting golf tournaments generated $306,510,000, and only a paltry $131,666 for syndicating real-time golf scores in the Internet market. The assertion that the PGA would have reduced incentive to enhance its $300 million business because of the prospect of increased competition in the Internet business is barely credible.

The evidence also showed that the PGA itself operated and improved its scoring system for years before seeking to profit from it on the Internet, during which time the PGA never sought to restrict the publication or syndication of these scores and, indeed, *encouraged* media participants to publish those scores. The PGA's sudden departure from its historical practice only highlights the weakness of its free-riding argument. *See Aspen*, 472 U.S. at 604.

Nor is there any weight to the argument that granting access will reduce the incentive of Morris and other media organizations to compete with the RTSS itself. Whatever the merits of that argument in other cases, it has no weight here because *the PGA itself* has foreclosed that option by outlawing wireless communications on the golf course by anyone other than the PGA. Pet. App. 3a. Permitting the PGA to continue its exclusionary conduct thus creates no "increased incentive" for potential competitors to develop their own scores. *See, e.g.*, IIIA Areeda, *supra*, ¶ 771b, at 172-73 (2d ed. 2002) (risk of deterred innovation and investment may be "insubstantial in the case where neither the plaintiff or anyone else could ever duplicate the claimed input in any effective way").

On the flip side, the harms from the PGA's restrictions are real and substantial. Consumers have fewer choices, and they pay substantially more for the options that they do have. When the PGA chooses not to publish real-time scores on its website (as it sometimes does, Pet. App. 32a), or the site becomes inaccessible to Internet users, fans are left without any way to find real-time golf scores on the Internet. Even when the PGA site is operational, consumers cannot choose to get information from Morris, a strong competitor that has won numerous industry awards for its use of the Internet. The Eleventh Circuit's decision thus eliminates consumer choice and consigns consumers to get their sports news from a single (inferior) source.

In short, when the anticompetitive effects of PGA's conduct are balanced against its procompetitive benefits, the former far outweigh the latter. Section 2 of the Sherman Act was intended to prevent situations in which companies exert or attempt to gain monopoly power over a particular market in ways that harm competition and consumer welfare. In this case, the PGA's assertion of a proprietary interest in public domain facts threatens to halt innovation in the Internet market for real-time golf scores and abrogate the right of a vigorous and successful competitor to compete in that market. By applying the wrong antitrust paradigm to the facts in this case, the Eleventh Circuit failed to conduct any of the § 2 analysis that would have enabled it to recognize these threats and prevent them from harming competition and consumers.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 26, 2004

APPENDICES

Appendix A

United States Court of Appeals,
Eleventh Circuit

MORRIS COMMUNICATIONS CORP., a Georgia Corporation, Plaintiff-Appellant,
v.
PGA TOUR, INC., Defendant-Appellee

Nos. 03-10226, 03-11502

March 31, 2004

Appeals from the United States District Court for the Middle District of Florida

Before EDMONDSON, Chief Judge, and DUBINA and COX, Circuit Judges.

DUBINA, Circuit Judge:

Plaintiff-Appellant, Morris Communications Corp. ("Morris"), brought suit against Defendant-Appellee PGA TOUR, Inc. ("PGA"), alleging that PGA violated section 2 of the Sherman Act, codified at 15 U.S.C. § 2, by monopolizing the markets for (1) the publication of compiled real-time golf scores on the Internet, and (2) the sale, or syndication of those scores. In addition, Morris alleged that PGA further violated section 2 of the Sherman Act by refusing to deal with Morris. The district court granted summary judgment in favor of PGA because it found, *inter alia,* that PGA had a

valid business justification for its actions. For the reasons that follow, we affirm the judgment of the district court.

I. BACKGROUND

A. Facts

Morris is a media company that publishes print and electronic newspapers. PGA is the sponsor of a series of professional golf tournaments throughout North America known as the PGA Tour. In order to provide golf scores during its tournaments, PGA has developed a Real-Time Scoring System ("RTSS") that allows PGA to monitor the play around the entire golf course. RTSS is an elaborate electronic relay scoring system that relies on state-of-the-art computer technology and equipment as well as dozens of trained workers and volunteers.

RTSS works as follows. During a PGA golf tournament, volunteers known as walking scorers follow each group of golfers on the course and tabulate the scores of each player at the end of each hole played. The scores are then collected by other volunteers, known as hole reporters, located at each of the eighteen greens on the golf course, who relay the scoring information to a remote production truck staffed by PGA personnel. The scores of all participating golfers are then processed at the remote production truck and transmitted to PGA's website, www.pgatour.com, as real-time golf scores, which are scores that are transmitted electronically nearly contemporaneously to their actual occurrence on the golf course. At the same time, the compiled scores are also transmitted to an on-site media center where members of the media are able to access the scores. The same information is also transmitted to various electronic leaderboards located throughout the golf course. As their name suggests, the

leaderboards typically show only the top ten or fifteen players' scores.

The nature of a PGA golf tournament makes it impossible for one person to physically follow all the players at once. First, the average golf course spans approximately 150 acres and various golfers play numerous holes simultaneously. In addition, the PGA does not allow its invitees to use cell phones and hand-held devices on the course because such devices might disrupt play. Therefore, the only source of compiled golf scores for all tournament players is RTSS. Likewise, the only physical location at which to obtain compiled golf scores is the media center.

In order for media organizations to have access to the PGA media center, they must obtain free press credentials from PGA. To obtain these credentials, all media organizations must agree to follow PGA's terms and conditions, including PGA's On-Line Service Regulations ("OLSR"). The OLSR require media organizations to delay publication on their Internet websites of scoring information obtained by RTSS until the earliest of (1) thirty minutes after the actual occurrence of the shot[1] or (2) the time when such information

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[1] Prior to 1999, credentialed members of the media could view scores in the media center and then re-key them directly into their own computers for transmission to their company's Internet servers. The result was that competitors of pgatour.com, including Morris, were able to publish real-time scores on their web sites as fast as or possibly faster than pgatour.com. Beginning in January 1999, shortly after the PGA Tour entered into an exclusive syndication contract with USA Today, it instituted [OLSR] applicable to all credentialed media invitees. Around the same time, Morris began publishing scores from PGA Tour tournaments on its web sites and selling them to third parties, and Morris appears to have been the PGA Tour's only major competitor in the syndication market.

has become legally available in the public domain, i.e. after the scores are posted on PGA's official website, www.pgatour.com.[2] In addition, the OLSR prohibit credentialed media organizations from selling, or syndicating, compiled scoring information obtained in the media center to non-credentialed third-party Internet website publishers without first buying a license to do so from PGA.[3]

Morris contends that, as a result of the OLSR, PGA is the only entity able to publish and sell real-time golf scores. Thus, Morris continues, PGA has an unfair advantage in the publication and syndication of the scores. PGA counters that it adopted the OLSR to preserve the value of its investment in creating and developing RTSS and to promote the competitiveness of its own website.

Based on the allegedly illegal OLSR, Morris filed suit against PGA, asserting four antitrust claims: (1) monopolization of the Internet markets, (2) unlawful refusal to deal, (3) monopoly leveraging, and (4) attempted monopolization of the Internet markets.[4]

Morris Communications Corp. v. PGA Tour, Inc., 235 F. Supp. 2d 1269, 1274 (M.D. Fla. 2002). The version of the OLSR at issue here was instituted in January 2000.

[2] PGA agreed that once the golf scores are posted on its website, they are in the public domain. *Id.* at 1275 n.9.

[3] "No scoring information may be used by, sold, given, distributed or otherwise transferred to, any party other than the Credentialed Site in any manner whatsoever, without the prior written consent of PGA TOUR." [R. Vol. 1 at Tab 1, Exh. 4.]

[4] Morris also alleged violations of Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. Ann. § 501.201 *et seq.*, and tortious interference with contract. Morris has not appealed the district court's grant of summary judgment in favor of PGA on these claims.

B. Procedural History

After extensive pre-trial discovery, the parties filed cross-motions for summary judgment on each claim. The district court granted PGA's motion for summary judgment, finding that PGA had a valid business justification for its OLSR because the OLSR prevented Morris from free-riding on PGA's investment in its costly RTSS. Accordingly, the district court found that PGA had not violated the antitrust laws even if it operated a monopoly and refused to deal with Morris.[5]

Subsequent to the granting of summary judgment in favor of PGA, Morris filed a Rule 60 motion for relief from judgment on the ground that, following the issuance of judgment in favor of PGA, PGA adopted new terms of service ("TOS") regarding www.pgatour.com in further violation of § 2 of the Sherman Act. The new TOS prohibit anyone from using the information displayed on www.pgatour.com for a commercial purpose without first buying a license from PGA. The district court denied the motion, finding that the new TOS were beyond the scope of the instant lawsuit, which addressed only PGA's media credentialing regulations and the OLSR. Accordingly, the district court found that

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[5] The district court did not, however, find that PGA had unlawfully monopolized or refused to deal. To the contrary, the district court found that Morris failed to prove a § 2 claim of monopolization as a matter of law, *Morris Communications*, 235 F. Supp. 2d at 1283; that the media center was not an essential facility, *id.* at 1285; that PGA did not have unlawful intent to harm competition or a competitor, *id.* at 1284, and thus did not unlawfully refuse to deal with Morris, *id.* at 1285-86, engage in unlawful monopoly leveraging, *id.* at 1286, or unlawfully attempt to monopolize, *id.*

Morris's challenge to the new TOS would be more aptly addressed in a separate lawsuit.

Morris timely and separately appealed the adverse summary judgment and Rule 60 orders. This court consolidated the two appeals.

II. STANDARDS OF REVIEW

This court reviews *de novo* whether the district court correctly granted summary judgment in favor of PGA on all counts, applying the same standard that governed the district court. *Levinson v. Reliance Standard Life Ins. Co.*, 245 F.3d 1321, 1325 (11th Cir.2001).

This court reviews whether the district court correctly denied Morris's Rule 60 motion for abuse of discretion. *See Bivens Gardens Office Bldg., Inc. v. Barnett Banks of Fla., Inc.*, 140 F.3d 898, 905 (11th Cir.1998).

III. ANALYSIS

Before discussing the antitrust issues in this case, it is important to note what this case is *not* about. Contrary to the arguments of Morris and its *amici curiae*, this case is not about copyright law,[6] the Constitution, the First

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[6] The arguments of Morris and its amici, who are various media organizations, entities, and associations, focus largely on irrelevant copyright law and argue that facts, such as golf scores, and compilations of facts are generally not a proper subject for copyright protection. While this assertion is a correct statement of law, it has no bearing on whether the golf scores and compilation of golf scores are the proprietary product of PGA's RTSS. At oral argument, Morris conceded that this is not a copyright case.

Amendment,[7] or freedom of the press in news reporting. This case is a straight-forward antitrust case involving a product and a defendant's assertion of a valid business justification as its defense to anticompetitive actions, if any. Also important to note is that this case is being decided based upon the facts presented, not a hypothetical situation, no matter how probable its actualization.[8] Accordingly, the only real issue before us is whether PGA's restrictions and prohibitions regarding Morris's ability to *sell* compiled real-time golf scores to third parties violates § 2 of the Sherman Act. We do not address Morris's right of access to and internal dissemination of compiled real-time golf-scores, as permitted by the PGA.[9]

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[7] In its argument for summary judgment in the district court, Morris stated that "this case is not a First Amendment case ... [i]t's an antitrust case." [R. Vol. 10 at pp. 8-9.]

[8] As the district court stated at the hearing on the cross-motions for summary judgment, "all that this court is interested in is the issues that you people bring to it. We're not making advisory opinions. And we don't change the facts. The facts are what the facts are. And what [we] rule on today may be a lot different than the case the two of you are involved in tomorrow." [R. Vol. 10 at p. 106.]

[9] At the hearing regarding the preliminary injunction, the district court asked counsel for PGA if PGA would permit "Morris ... to disseminate this information to its companies, its various news companies, not charging them anything, just disseminating it"? Counsel for PGA responded:

There's no problem because that to us is news coverage, and . . . [w]e eagerly, eagerly invite and want the press to do their function, their normal function of gathering and disseminating the news, and because it's so important to us to have them do that, we told Morris a year ago that we would allow them in the media center to sit there and re-key right from there into their own website and any of their related companies as a matter of news coverage, they could have those real-time scores right away for free. . .. The problem comes in only when Morris wishes to go into another business, which they label the news syndication business. . .. [I]t is not the business of gathering and disseminating news. It is the

A. Monopolization[10]

Section 2 of the Sherman Act provides that "[e]very person who shall monopolize, or attempt to monopolize, . . . any part of the trade or commerce among the several States, . . . shall be deemed guilty of a felony. . . ." 15 U.S.C. § 2. "The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71, 86 S. Ct. 1698, 1704, 16 L. Ed. 2d 778 (1966).

The first element, monopoly power, is the power to control prices in or to exclude competition from the relevant market. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391, 76 S. Ct. 994, 1005, 100 L. Ed. 1264 (1956). The

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business of selling a commercially valuable product that we have developed and paid for and we ought to be the ones to sell that.
[R. Vol. 8 at pp. 34-36.]

[10] Morris challenges the district court's resolution of its monopolization and attempt to monopolize claims. For the purposes of this case, the elements of the two offenses differ in only one material respect: attempt to monopolize requires specific intent to achieve monopoly power. *See Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456, 113 S. Ct. 884, 890-91, 122 L. Ed. 2d 247 (1993) ("[T]o demonstrate attempted monopolization a plaintiff must prove (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power."). Therefore, the attempt claim in this case is more difficult to maintain and prove. Because Morris does not withstand summary judgment on its monopolization claim, it cannot maintain its attempt claim. Accordingly, we decline to discuss the attempt claim further.

second element requires predatory or exclusionary acts or practices that have the effect of preventing or excluding competition within the relevant market. *See United States v. Microsoft*, 253 F.3d 34, 58 (D.C. Cir. 2001). In order for a practice to be exclusionary, "it must harm the competitive *process* and thereby harm consumers." *Id.* "[H]arm to one or more *competitors* will not suffice" for a § 2 violation. *Id.; see also Consultants & Designers, Inc. v. Butler Serv. Group, Inc.*, 720 F.2d 1553, 1562 (11th Cir. 1983) ("The relevant inquiry is not whether [a company's] present attempt to exclude adversely impacts competition but rather whether its acquisition of the power to exclude competitors had a sufficiently adverse impact on competition to constitute a [Sherman Act] violation.").

B. Refusal to Deal[11]

Two theories exist upon which to predicate a unilateral refusal to deal claim: (1) the intent test and (2) the essential facility test. *Mid-Texas Communications Sys., Inc. v. AT&T*, 615 F.2d 1372, 1387 n.12 (5th Cir. 1980).[12] Under the intent test, it is unlawful for a monopolist to maintain or extend its monopoly power by intentionally engaging in conduct that unnecessarily excludes competitors and impairs competition.

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[11] Morris challenges the district court's resolution of its refusal to deal and monopoly leveraging claims. For purposes of this case, the elements of the two claims are sufficiently similar to warrant only one discussion. *See Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, --- U.S. ----, 124 S. Ct. 872, 883 n. 4, 157 L. Ed. 2d 823 (2004) ("[L]everaging presupposes anticompetitive conduct, which in this case could only be the refusal-to-deal claim we have rejected.").

[12] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1207-09 (11th Cir. 1981) (en banc), this court adopted as binding precedent all Fifth Circuit decisions issued prior to October 1, 1981.

See id. at 1388; *see also Eastman Kodak Co. v. S. Photo Materials Co.*, 273 U.S. 359, 47 S. Ct. 400, 71 L. Ed. 684 (1927).

Under the essential facility test, a company that has exclusive control over a facility essential to effective competition may not deny potential competitors access to that facility on reasonable terms and conditions if to do so would create or maintain monopoly power in the relevant market. *Covad Communications Co. v. BellSouth Corp.*, 299 F.3d 1272, 1285 (11th Cir. 2002), *cert. granted and judgment vacated on other grounds*, --- U.S. ----, 124 S. Ct. 1143, 157 L. Ed. 2d 1040 (2004); *MCI Communications Corp. v. AT&T*, 708 F.2d 1081, 1132-33 (7th Cir. 1983); *see also Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, --- U.S. ----, 124 S. Ct. 872, 881, 157 L. Ed. 2d 823 (2004) ("The indispensable requirement for invoking the doctrine is the unavailability of access to the 'essential facilities'; where access exists, the doctrine serves no purpose."). The plaintiff has the burden of proving that the defendant controls an essential facility that cannot be practically or economically duplicated. *See Covad Communications*, 299 F.3d at 1285.

In the absence of any purpose to create or maintain a monopoly, however, a company may deal or refuse to deal with whomever it pleases. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601-02, 105 S. Ct. 2847, 2857, 86 L. Ed. 2d 467 (1985) (quoting *United States v. Colgate & Co.*, 250 U.S. 300, 307, 39 S. Ct. 465, 468, 63 L. Ed. 992 (1919)). Even a company with monopoly power has no general duty to cooperate with its business rivals and may refuse to deal with them if valid business reasons exist for such refusal. *See Mid-Texas Communications*, 615 F.2d at 1388.

Ordinarily, when determining whether a defendant has violated § 2 of the Sherman Act, we first determine the relevant market and then decide whether the defendant possessed monopoly power in that market. In this case, however, we do not pursue such an inquiry because we agree with the district court that even if PGA possessed monopoly power in the relevant market, Morris's § 2 claims cannot prevail because PGA has a valid business justification for its actions. Therefore, even if PGA is monopolistic, and even if PGA refused to deal with Morris, it has not violated § 2 of the Sherman Act.

C. Valid Business Justification as a Defense

"The Sherman Act is . . . the 'Magna Carta of free enterprise,' but it does not give judges *carte blanche* to insist that a monopolist alter its way of doing business whenever some other approach might yield greater competition." *Verizon Communications,* 124 S. Ct. at 883 (internal quotations omitted). To the contrary, "Section 2 of the Sherman Act . . . seeks merely to prevent *unlawful monopolization* " and unlawful refusals to deal. *Id.*

Unlawful monopoly power requires anticompetitive conduct, which is "conduct without a legitimate business purpose that makes sense only because it eliminates competition." *Gen. Indus. Corp. v. Hartz Mountain Corp.,* 810 F.2d 795, 804 (8th Cir. 1987); *see also LePage's Inc. v. 3M,* 324 F.3d 141, 153-54 (3d Cir. 2003) (discussing *Conwood Co., L.P. v. United States Tobacco Co.,* 290 F.3d 768 (6th Cir. 2002), *cert. denied,* 537 U.S. 1148, 123 S. Ct. 876, 154 L. Ed. 2d 850 (2003)). Likewise, refusal to deal that is designed to protect or further the legitimate business purposes of a defendant does not violate the antitrust laws, even if that refusal injures competition. *See Aspen Skiing,* 472 U.S. at

604, 105 S. Ct. at 2858; *see also NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 137, 119 S. Ct. 493, 499, 142 L. Ed. 2d 510 (1998) (citing *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225, 113 S. Ct. 2578, 2589, 125 L. Ed. 2d 168 (1993), for the proposition that "[e]ven an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws"); *United States Football League v. National Football League*, 842 F.2d 1335, 1360 (2d Cir. 1988) (concluding that no § 2 liability existed where network's actions were based on desire "to obtain $736 million in rights fees, not to exclude competitors").

Once the defendant has met its burden to show its valid business justification, the burden shifts to the plaintiff to show that the proffered business justification is pretextual. *See U.S. Anchor Mfg., Inc. v. Rule Indus., Inc.*, 7 F.3d 986, 1002 (11th Cir. 1993); *see also Image Technical Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1212 (9th Cir. 1997).

In this case, PGA met its business justification burden by showing that it seeks to prevent Morris from "free-riding" on PGA's RTSS technology. *See Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 55, 97 S. Ct. 2549, 2560, 53 L. Ed. 2d 568 (1977) (stating that prevention of "free-riding" by competitors is a legitimate business purpose); *Consultants & Designers*, 720 F.2d at 1559 (concluding that defendant "had a legitimate interest in protecting from opportunistic appropriation its investment in acquiring the information necessary to carry on its business"). To achieve its business purpose, PGA has refused to grant Morris access to PGA tournaments unless Morris agrees not to sell the product of PGA's proprietary RTSS--compiled real-time golf scores--to non-credentialed third-party Internet publishers. Morris responds that it has a right to sell such product

notwithstanding that RTSS was developed and paid for, and is operated by, PGA.[13] We disagree with Morris. The compiled real-time golf scores acquired through RTSS are not a product that Morris has a right to sell because they are a derivative product of RTSS, which PGA owns exclusively.[14] We agree with the district court that PGA "has a right to sell or license its product, championship golf, and its derivative product, [compiled] golf scores, on the Internet in the same way the [PGA] currently sells its rights to television broadcasting stations." *Morris Communications Corp. v. PGA Tour, Inc.*, 235 F. Supp. 2d 1269, 1282 (M.D. Fla. 2002).

If Morris wishes to sell PGA's product, it must first purchase it from PGA. *See Consultants & Designers,* 720 F.2d at 1559 (explaining that plaintiff did not have the right to abrogate defendant's property interest). Section 2 of the Sherman Act does not require PGA to *give* its product freely to its competitors. *See Seagood Trading Corp. v. Jerrico,*

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[13] Morris also argues that PGA is not allowed to put restrictions on the dissemination of the compiled golf scores once they reach the media center because PGA did not previously put any restrictions on their dissemination. This argument is unpersuasive. PGA has a right to control its property interest in its RTSS and the compiled golf scores, which are the product of RTSS, regardless of its past practices. As the district court stated: "what [PGA] say[s] the delay should be and what delay [PGA] can legally impose are two different things perhaps." [R. Vol. 10 at p. 104.] The lack of prior restrictions is merely indicative of PGA's symbiotic relationship with the media.

[14] Morris stated in the district court that it was "not disputing that [PGA] may have a property right." [R. Vol. 10 at p. 93.] As counsel for PGA stated at the hearing on the preliminary injunction: "without this elaborate, comprehensive system there wouldn't be real-time scores that Morris would like to sell to third parties. It just wouldn't be there because these don't exist in the air." [R. Vol. 8 at p. 31.]

Inc., 924 F.2d 1555, 1573 (11th Cir. 1991) (stating that it "is not a function of the antitrust laws" to equip plaintiffs with defendants' competitive advantages). PGA is willing to sell its product to its competitors, including Morris, thereby allowing credentialed media organizations like Morris to syndicate compiled real-time golf scores after paying a licensing fee to PGA. Accordingly, we conclude from the record that PGA has satisfied its burden to show a valid business justification.

D. Business Justification Is Not Pretextual

Because PGA has met its burden of showing that its asserted business justification is valid, the burden shifts to Morris to allege facts that support an inference that the proffered justification is merely pretextual, thereby establishing genuine issues of material fact. *U.S. Anchor Mfg.*, 7 F.3d at 1002; *see also Image Technical Servs.*, 125 F.3d at 1212. Morris argues that PGA's only justification for its refusal to deal with Morris on Morris's terms is economic and such sole motivation is not a valid business justification; thus, PGA's justification is pretextual. *See LePage's*, 324 F.3d at 163 ("[D]efendant's assertion that it acted in furtherance of its economic interests does not constitute the type of business justification that is an acceptable defense to § 2 monopolization.").

Morris supports its argument with a series of cases which are fundamentally distinguishable from this case. In the cases upon which Morris relies, the plaintiffs alleging antitrust violations had created with their own work and efforts, or purchased with their own money, their *very own products* that defendants prohibited them from selling. *See, e.g., Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 485, 112 S. Ct. 2072, 2092, 119 L. Ed. 2d 265 (1992)

(plaintiffs "invest substantially . . . in parts inventory"); *Aspen Skiing*, 472 U.S. at 587-88, 105 S. Ct. at 2850 (plaintiff developed and maintained its own competitive ski resort and ski packages); *Lorain Journal Co. v. United States*, 342 U.S. 143, 149-50, 72 S. Ct. 181, 184-85, 96 L. Ed. 162 (1951) (injured competitor trying to sell its radio air time for advertisements); *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 221, 39 S. Ct. 68, 69, 63 L. Ed. 211 (1918) (plaintiff "gathers in all parts of the world, by means of various instrumentalities of its own, by exchange with its members, and by other appropriate means, news and intelligence of current and recent events of interest to newspaper readers"); *LePage's*, 324 F.3d at 144 (plaintiff selling its own transparent tape); *Microsoft Corp.*, 253 F.3d at 63 (injured competitors deterred from selling their own computers and browsers); *Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841, 854 (2d Cir. 1997) (analyzing free-riding issues and noting that plaintiff did not free-ride because it used its own efforts to conduct business); *U.S. Anchor Mfg.*, 7 F.3d at 990 (plaintiff manufactures and supplies anchors); *Trans Sport, Inc. v. Starter Sportswear, Inc.*, 964 F.2d 186, 187 (2d Cir. 1992) (plaintiffs purchased product from defendants).

Morris refers to this distinction as PGA's "sweat of the brow" defense and correctly states that it is not a defense *in a copyright case*. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 359-60, 111 S. Ct. 1282, 1295, 113 L. Ed. 2d 358 (1991) (concluding that "sweat of the brow" is no defense in a copyright case). [Appellant Br. at 53-55.] This well-established rule of copyright law is irrelevant, however, in this antitrust case. The "sweat of the brow" product, to which Morris (and the district court) refer, is no different than, for example, the interconnection services in *Verizon Communications*, 124 S. Ct. at 876, the job shoppers in

Consultants & Designers, 720 F.2d at 1555, and the sports jackets in *Starter Sportswear*, 964 F.2d at 187.

Moreover, even if we overlook the fundamental and dispositive distinction between this case and the cases cited by Morris, the case law supports summary judgment in favor of PGA. *See Verizon Communications*, 124 S. Ct. at 879 ("*Aspen Skiing* is at or near the outer boundary of § 2 liability"); *Aspen Skiing*, 472 U.S. at 593-94, 105 S. Ct. at 2852-53 (defendant refused to accommodate and cooperate with plaintiff, refused to *sell* its product to plaintiff, and acted contrary to its own economic interests in order to eliminate plaintiff); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 370-72, 93 S. Ct. 1022, 1026-27, 35 L. Ed. 2d 359 (1973) (defendant was already in the business of *selling* a service to certain customers and refused to *sell* the same service to certain other customers); *Lorain Journal*, 342 U.S. at 148-49, 72 S. Ct. at 183-84 (defendant refused to *sell* to plaintiff in violation of the Sherman Act); *Starter Sportswear*, 964 F.2d at 189-91 (holding, in a factually analogous case, that defendant had valid business justification for refusal to deal); *Fishman v. Estate of Wirtz*, 807 F.2d 520, 562 (7th Cir. 1986) (holding defendant liable under § 2 for refusing to *lease* Chicago Stadium to plaintiff).

The relevant law supports our conclusion that Morris's argument is unavailing and does not show that PGA's business justification is pretextual. The prevention of free-riding, which is an inherently economic motivation, provides a valid business justification on the facts presented here. Accordingly, Morris has not raised any issues of material fact and summary judgment in favor of PGA was proper. *See Int'l Railways of Cent. Am. v. United Brands Co.*, 532 F.2d 231, 239-40 (2d Cir.), *cert. denied*, 429 U.S. 835, 97 S. Ct. 101, 50 L. Ed. 2d 100 (1976) (stating that proof of a

company's reasonable steps to preserve its business interests does not, without more, raise a genuine issue of material fact under § 2).

E. Morris's Rule 60(b) motion

Relief pursuant to Rule 60(b)(2) is appropriate only if the moving party offers newly discovered evidence that could alter the outcome of the trial. *See Wilson v. Thompson*, 638 F.2d 801, 804 (11th Cir. 1981); Fed. R. Civ. Pro. 60(b)(2). Because we review the district court's decision for abuse of discretion, "it is not enough that a grant of the motion might have been permissible or warranted." *Fackelman v. Bell*, 564 F.2d 734, 736 (5th Cir. 1977). After reviewing the record, we conclude that the district court did not err in finding that the new TOS evidence would have failed to alter the outcome of the trial in light of PGA's valid business justification for its regulations. Accordingly, we hold the district court did not abuse its discretion when it denied the Rule 60 motion.

IV. CONCLUSION

Contrary to Morris's argument regarding copyright law, this case is not about copyright and the district court did not find the golf scores to be trade secrets.[15] The district court correctly found that a company--even a monopolist company--that expends time and money to create a valuable product does not violate the antitrust laws when it declines to provide that product to its competitors for free. PGA has accommodated Morris at every step along the way, has agreed to sell its product to Morris, and has acted

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[15] "The [PGA]'s property right does not come from copyright law, as copyright law does not protect factual information, like golf scores." *Morris Communications*, 235 F. Supp. 2d at 1281.

appropriately to protect its economic interests and investments. Yet Morris demands that it be given access to the product of PGA's proprietary RTSS, without compensating PGA, so that Morris can then sell that product to others for a fee. That is the classic example of "free-riding," the prevention of which, under antitrust law, constitutes a legitimate pro-competitive reason for imposing a restriction. For the foregoing reasons, we affirm the district court's grant of summary judgment in favor of PGA and the district court's order denying Morris's Rule 60(b) motion.

AFFIRMED.

Appendix B

United States District Court,
M.D. Florida.
Jacksonville Division.

MORRIS COMMUNICATIONS CORPORATION, a Georgia Corporation, Plaintiff,
v.
PGA TOUR, INC., Defendant.

No. 3:00-CV-1128-J-S0TJC.

Dec. 13, 2002.

ORDER

SCHLESINGER, District Judge.

This cause is before the Court on Defendant's Motion for Summary Judgment (Doc. No. 109, filed June 24, 2002) and Plaintiff's Response (Doc. No. 136, filed June 24, 2002); Plaintiff's Motion for Partial Summary Judgment on Liability (Doc. No. 125, filed June 24, 2002) and Defendant's Memorandum of Law in Opposition (Doc. No. 139, filed June 24, 2002)[1]; and Defendant's Motion to Strike Plaintiff's Second Notice of Supplemental Authority (Doc. No. 150, filed July 16, 2002). Following a hearing during which both sides presented oral argument on the summary judgment motions, all pending motions are ripe for consideration.

As an initial matter, Defendant's Motion to Strike is **DENIED**.

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[1] The summary judgment motions and responses were originally filed under seal, and were unsealed by Court Order on June 24, 2002.

I. Background

Introduction

Many issues revolve around the periphery of this case, and the Court will take a minute to address what the case is and is *not* about. The quintessential issue is who has the right to instantaneous information and its value. This case is not about the ability or right of a publisher to disseminate and profit from information and facts released into the public domain through radio or television broadcasts or through a web site. Nor is this case about the ability of the media to cover and publish information for a story in the next day's paper or even in that evening's television news coverage. The First Amendment freedom of the press, while at first blush might appear to be relevant, is not involved. *See National Broadcasting Co. v. Communications Workers of America*, 860 F.2d 1022, 1024 (11th Cir. 1988) (stating that the First Amendment right of Free Press does not apply absent state action). The case, in general, does not resolve issues of journalistic integrity.[2] This case is to some extent

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[2] Morris claims that journalistic integrity requires a journalist to report on news firsthand, if possible, instead of relying on what the creator of the news reports to the journalist or in some fashion to have the ability to verify questionable facts that come to their attention before publishing them. Morris's goal in this suit is to get access to the PGA Tour's scoring system, which will allow Morris to report scores of golfers, but only the scores that the PGA Tour relays to Morris, through a procedure the PGA Tour developed and has in place to gather simultaneous scores in its golf tournament. If Morris were to prevail on its claims, its journalists would, by its own standards, publish information gathered by others. Morris employees do not actually view the action they report on, but merely copy numbers provided by PGA Tour, whether in the media tent or through the PGA Tour's web site. If Morris's reporters believe the PGA Tour's information is incorrect, they may ask that the PGA Tour verify it in order to maintain journalistic integrity, but Morris would only

about Morris's claimed ability or need to track a single player, ranked 100, from a small town who is not currently covered by the leader-board or being covered by the broadcast station. Morris needs access to all the players' scores to relate to a local following in that small town where its native son or daughter stands in relation to the other players in the tournament. Finally, this case is not about "streaming" video and audio or "webcasting."[3]

Factual Background[4]

Plaintiff, Morris Communications Corporation ("Morris"), is a Georgia corporation that publishes over thirty traditional print newspapers as well as a number of Internet-based, electronic newspapers. Defendant, PGA Tour, Inc. ("PGA Tour"), is a Maryland corporation with its principal place of business in Ponta Vedra, Florida. The PGA Tour is mainly engaged in the business of promoting professional golf tournaments throughout North America, collectively known as the PGA Tour. Players on the PGA Tour, generally recognized to be among the best golfers in the world, assign all television, radio, motion picture and other rights related to PGA Tour events to the PGA Tour, and with limited exceptions, are restricted from competing in tournaments

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seek to verify unusual scores. For example, if a golfer scores a 9 on a par 3 hole (par is the average or expected number of strokes a player would use to complete the hole), Morris contends that it would alert the PGA Tour and ask that the unusual score be verified. However, Morris would not ask to verify a golf score of 2 or 4 on a par 3 hole, even though that score might be as inaccurate as the score of 9.

[3] For a description and definition of "streaming" and "webcasting", see Fan, *When Channel Surfers Flip to the Web: Copyright Liability for the Internet Broadcasting*, 52 Fed. Comm. L.J. 619, 622-27 (2000).

[4] The parties do not dispute the facts, only their import.

sponsored by other entities. The record evidence in this case shows that the PGA Tour is the most widely recognized professional golfing tour in the United States. Although there are other golf tournaments which generate fan interest, few can rival PGA Tour events in terms of overall popularity.

At issue in this case is the extent to which the PGA Tour may be allowed to limit the access of Morris and other media entities to its own private golf tournaments. Specifically, the Court must resolve whether the PGA Tour may legally condition access to its tournaments on Morris's agreement not to syndicate "real-time" golf scores obtained from an on-site media center. As this Court noted in its Order denying Morris's Motion for Preliminary Injunction[5] and as the parties have emphasized throughout these proceedings, this case is more than simply about golf scores. Rather, it presents a novel and compelling question of who has the "right" to report the news, produced and gathered by others, in an age of near-instantaneous information.

PGA Tour events are covered extensively by a number of different print, broadcast, and electronic media organizations. Although these events are conducted on private golf courses, the PGA Tour issues credentials to members of the media who are thereby invited to its tournaments for the purpose of providing media coverage. Traditionally, Morris and its subsidiary publications have been among the entities that have received media credentials to PGA Tour tournaments. Both the PGA Tour and members of the media have traditionally benefitted from this arrangement in that the media are better positioned to satisfy the public's demand for golf-related information, and the PGA Tour enjoys enhanced publicity, which in turn generates greater demand for its golf

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[5] *Morris Communications Corp. v. PGA Tour, Inc.*, 117 F. Supp. 2d 1322 (M.D. Fla. 2000).

tournaments and related goods and services, thus producing revenue for the PGA Tour.

Real Time Golf Scores

The parties' dispute in this case concerns the on-line publication of "real-time" golf scores. Real-time scores, as the term suggests, are scores that are transmitted electronically nearly contemporaneously to their actual occurrence on the golf course. In this way, Internet users are able to track during a golf tournament each participating player's progress on a hole-by-hole basis. In order to improve its scoring capabilities for its tournaments, including transmission of real-time golf scores over the Internet, the PGA Tour has designed and implemented an elaborate electronic relay known as the Real-Time Scoring System ("RTSS").

RTSS works as follows: During a given golf tournament, volunteer workers called "hole reporters" follow each group of golfers on the golf course and tabulate the scores of each player at the end of each hole. The scores are then collected by other volunteers located at each of the eighteen greens on the golf course, who, with the aid of hand-held wireless radios, relay the scoring information to a remote production truck staffed by personnel employed by the PGA Tour.[6] The scores of all participating golfers are then processed at the remote production truck and transmitted by the PGA Tour to its Internet web-site, pgatour.com. The PGA Tour claims that

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[6] Under newly developed technology known as "Shotlink," the walking scorers themselves will be able to relay scores directly to the production truck. In addition, the new technology allows the scorers to transmit additional data such as club selection, the lie of the ball, and the distance to the pin. Morris has not sought to syndicate any information obtainable from Shotlink other than the raw score.

it takes "about five minutes" for the information to be routed from the production truck to pgatour.com. At the same time, real-time scores are also transmitted to an on-site media center where accredited members of the media are able to access the scores. The same information is also transmitted to various electronic "leaderboards" located throughout the golf course for public viewing by spectators. The leaderboards do not simultaneously show the real time scores of all participating golfers. Rather, they typically show only the top ten or fifteen scores.

Due to the nature and size of golf courses, which may span as much as 150 acres, comprehensive real-time scores -- that is, up-to-the-minute scores of every competitor -- can only be compiled using a relay system such as RTSS. During a golf tournament, different groups of players compete contemporaneously at different holes such that any one spectator can only view a limited number of players at any one of the eighteen holes. Thus, in order to generate real-time scores, it is necessary to have individuals stationed at each hole as the tournament progresses so that the entire golf course can be monitored simultaneously. Acknowledging that some kind of relay system is needed to generate the type of real-time scoring information it wishes to syndicate, Morris submits that it is unable to implement such a system itself due to the PGA Tour rules prohibiting unauthorized use of wireless communication devices on the golf course at its tournaments.[7]

Although the exact amount is unknown, it appears that the PGA Tour has invested tens of millions of dollars in RTSS, dating back to the early 1980s. Nevertheless, not all of this investment has been devoted solely to developing Internet-

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[7] Morris has also argued that it would be socially wasteful for it to duplicate the PGA Tour's efforts in implementing such a system.

based scoring. The Internet did not rise to prominence until at least the mid-1990s, and pgatour.com did not become operational until 1997. Moreover, the evidence in this case shows that RTSS was, and continues to be, developed with an eye toward enhancing the on-site scoreboards for live spectators and for television broadcasts. For example, Ken Finchem, who is presently the Commissioner of the PGA Tour, noted in 1990 that "the electronic scoreboard system was created to provide the growing number of spectators at PGA Tour tournaments with up to the minute information on action all around the course."

Additionally, the Internet presently represents only a small fraction of the PGA Tour's overall revenue. For example, the PGA Tour's annual revenues from its Internet syndication contracts is approximately $130,000. In contrast, a 1999 financial audit of the PGA Tour revealed "direct" revenues of $306,510,000, which included revenues from television and tournaments.

Nevertheless, the PGA Tour has made no secret in this litigation of its desire to maintain a commercial advantage in the market for selling real-time golf scores and has vigorously defended its right to protect its proprietary investment in RTSS. To that end, it has enacted a series of regulations designed to prevent potential competitors from immediately selling scores obtained in the media center to third parties.

On Line Service Regulations

Prior to 1999, credentialed members of the media could view scores in the media center and then re-key them directly into their own computers for transmission to their company's Internet servers. The result was that competitors of

pgatour.com, including Morris, were able to publish real-time scores on their web sites as fast as or possibly faster than pgatour.com. Beginning in January 1999, shortly after the PGA Tour entered into an exclusive syndication contract with USA Today, it instituted Online Service Regulations ("OLSR") applicable to all credentialed media invitees. Around the same time, Morris began publishing scores from PGA Tour tournaments on its web sites and selling them to third parties, and Morris appears to have been the PGA Tour's only major competitor in the syndication market.[8]

Under the terms of the original OLSR, scoring information obtained from the media center could be published on any web site, but not sooner than 30 minutes after the actual occurrence of the shots. The PGA Tour's admitted purpose for the new regulations was to allow it to have the first opportunity to post the real-time scores on its web site and those of its syndicates.

In April 1999, the PGA Tour amended its OLSR so that scoring information, obtained in the media center, could appear on an unaffiliated web site *either* no sooner than 30 minutes after the actual occurrence of the shots *or* when the information became legally available as public information.[9] Shortly afterwards, the PGA Tour agreed to allow Morris to immediately publish scores obtained from the media center on its own web-sites, but not on the web-sites of non-

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[8] While Morris was the only major competitor in the syndication market, many competitors, such as www.thegolfchannel.com, www.nbc.com, and www.golfonline.com, still vied for market share in the distribution of golf scores on the Internet.

[9] Although it is a matter of contention when the scoring information becomes legally available to the public, the PGA Tour has conceded that golf scores are in the public domain once they are published on pgatour.com or are publically broadcasted on either television or radio.

credentialed third parties. In January 2000, the PGA Tour again amended its OLSR so that "no scoring information may be used by, sold, given, distributed or otherwise transferred to, any party other than the Credentialed Site in any manner whatsoever, without the prior written consent of the PGA Tour." Violators were subject to revocation of their media credentials.

In May 2000, the PGA Tour learned that Morris was planning to sell scoring information obtained directly from the media center to the Denver Post, in violation of the January 2000 OLSR. The PGA Tour reminded Morris of the prohibition against syndicating scores obtained in the media center. After some discussion between the parties, the PGA Tour agreed to allow Morris to syndicate scores to the Denver Post for one tournament only.

In August 2000, after some additional negotiations, the PGA Tour agreed to waive the restriction on selling real-time golf scores to third parties on the condition that Morris agree to collect the scores to be sold for syndication from pgatour.com rather than the on-site media center. Morris attempted to gather real-time golf scoring information using this alternative method but ultimately abandoned it as unworkable. Among other problems, there was an inevitable delay in scores taken directly from pgatour.com because of the time needed to re-key the scores from that web site onto Morris's servers. In the meantime, Morris continued to negotiate syndication contracts with a number of third parties, apparently assuming that some satisfactory resolution would be reached with the PGA Tour.

On September 13, 2000, Morris informed the PGA Tour that its attempts at obtaining real-time scores through pgatour.com had failed and requested that it be credentialed

to syndicate real-time scores directly from the on-site media center. The PGA Tour refused to accommodate this request. It subsequently informed Morris that media credentials would only be provided on the condition that scoring information collected from the on-site media center be used only in publications within the Morris Communications Group, as required under the OLSR.

Motion for Preliminary Injunction

On October 11, 2000, Morris filed its Complaint and Motion for Preliminary Injunction, alleging violations of Section 2 of the Sherman Act, 15 U.S.C. § 2, the Florida Antitrust Act, Fla. Stat. § 542.19, and the Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.201 *et seq.* Morris alleged that the PGA Tour possesses monopoly power over access to its golf tournaments and has unfairly used that power by attempting to stifle competition in the separate market for syndicated real-time golf scores. In response, the PGA Tour argued that it enjoys a property right in RTSS and that its regulations restricting the syndication of real-time golf scoring information gathered and generated by RTSS constitute a reasonable safeguard against would-be free riders seeking to unfairly capitalize on its product.

This Court denied Morris's Motion for Preliminary Injunction, finding that Morris had failed to meet its high burden for proving entitlement to injunctive relief. *See Morris Communications Corp. v. PGA Tour,* 117 F. Supp. 2d 1322, 1326 (M.D. Fla. 2000). The Court found that Morris had failed to show a substantial likelihood of success on the merits of its Section 2 monopolization claims.[10] Even

[10] The Court also concluded that Morris had not satisfied its burden with respect to showing irreparable harm or that the balance of harms and the

assuming that the PGA Tour possessed monopoly power in the market for real-time golf scores, Morris had not shown that the PGA Tour lacked a legitimate business justification for its restrictions on syndication of real-time scores. Specifically, the Court was without sufficient evidence regarding the extent to which it would be condoning free riding on the PGA Tour's proprietary investment in RTSS if it ordered the PGA Tour to allow Morris unconditional access to its on-site media centers. *Id.* at 1326-30.

Effects of the On Line Service Regulations

Both parties have submitted substantial evidence regarding the OLSR's possible effects on competition. Not surprisingly, the evidence is somewhat contradictory in this regard. For example, the PGA Tour produced the deposition transcript of the new media sports producer of The Augusta Chronicle, which is owned by Morris. He stated that at least one Internet syndication customer, insidetheropes.com, "never made any demands as to time length [between the occurrence of scores and their real time publication]." Similarly, Mike McLeod, the project manager for golf at CNN/SI, with whom Morris has a syndication contract, stated that even when Morris was required to transmit golf scores remotely, i.e., off of pgatour.com rather than directly from the media center, "for CNN/SI's editorial purposes, the scores were reported fast enough to be editorially acceptable."

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public interest weighed in favor of injunctive relief. *Morris*, 117 F. Supp. 2d at 1330-31.

This evidence, however, is belied by other evidence presented by Morris suggesting that both consumers[11] in the syndication market and the PGA *Tour itself place a premium* on speed. This evidence suggests that OLSR have the effect of harming competitors' ability to compete for the sale of syndicated real-time golf scores. For example, Mr. McLeod's comments notwithstanding, it appears that the value of Morris's syndication contract with CNN/SI has decreased dramatically since the OLSR were implemented. Under the original syndication agreement, executed in 1999, CNN/SI agreed to pay Morris approximately $431,666 annually for real-time golf scores. In 2001, when the OLSR were in effect, that amount was $185,599. By 2002, it had been further reduced to $150,000. By the same token, the record reflects that the PGA Tour has raised the prices for real-time golf scores in its own syndication agreements with USA Today. Moreover, in its most recent contract with USA Today, the PGA Tour no longer promises exclusive syndication rights, which arguably makes the agreement less valuable to USA Today despite the higher price.[12] The higher prices for real-time scores may reflect a consumer preference for more up-to-date scores, which is reflected elsewhere in the record. For example, hits on pgatour.com have increased by 50 to 100% since the PGA Tour first instituted its OLSR.

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[11] The "consumers" in the syndication market refer generally to web-site publishers who pay other publishers for real-time scoring information; advertisers, who usually represent the primary source of revenue for Internet web sites; and Internet users, who log on to the various web sites.

[12] PGA Tour counters by noting that "cash" consideration (as opposed to promotional equivalents) is the same and that the new contract provides USA Today with more advertising funds and greater technical assistance, as well as expanded use of PGA Tour trademarks.

Perhaps most tellingly, the PGA Tour itself has acknowledged that the OLSR were implemented in order to maintain a commercial advantage. In a January 1999 letter to Carl Cannon, Vice President of Morris and Publisher of the Florida Times Union, Commissioner Finchem stated that:

> The primary reason for requiring this delay [in the OLSR] is so that *pgatour.com*, the PGA TOUR's own web site, can have a window of exclusivity for the provision to the public of our basic product, official real time scores from our events. We have found that the appearance of exclusive real time scores on our web site drives tremendous traffic volume to the site during times when tournaments are being conducted, particularly outside the television coverage window. Requiring a thirty (30) minute delay in the dissemination of scores enables us to preserve the value of our real time scoring.

Thus, the record seems to clearly indicate that the OLSR have the purpose and effect of giving the PGA Tour a commercial advantage in the syndication market and disadvantaging potential competitors, including Morris. As discussed below, this does not necessarily mean that the PGA Tour has violated any antitrust laws. Nevertheless, it is important to identify the OLSR's potentially deleterious effect on competitors, if not competition.

Moreover, Morris notes that if the PGA Tour is either unable or unwilling to publish real time golf scores from its tournaments on pgatour.com, consumers are foreclosed from obtaining such information on the Internet. Morris cites the example of the recent World Golf Championship, where pgatour.com did not publish real-time scores. As a result, the real-time scores were simply unavailable on line.

In its summary judgment papers, Morris responds to the concerns raised in the Court's Preliminary Injunction Order by arguing that it has successfully demonstrated a lack of any pro-competitive justification for the OLSR. For its part, the PGA Tour continues to assert that it has a proprietary right in RTSS and the OLSR represent a commercially reasonable way to protect its investment. The PGA Tour also argues that Morris cannot show monopoly power in any relevant market, a prerequisite to prevailing on a monopolization claim. Specifically, it asserts that there is no distinct product market for "real-time" golf scores, and Morris's monopolization claims must therefore be dismissed.

II. Standard of Review

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the initial burden of showing the Court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial. *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991). When a moving party has discharged its burden, the nonmoving party must then "go beyond the pleadings," and by its own affidavits, or by "depositions, answers to interrogatories, and admissions on file," designate specific facts showing that there is a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

In determining whether the moving party has met its burden of establishing that there is no genuine issue as to any

material fact and that it is entitled to judgment as a matter of law, the Court must draw inferences from the evidence in the light most favorable to the nonmovant, *Key West Harbour v. City of Key West,* 987 F.2d 723, 726 (11th Cir. 1993), and resolve all reasonable doubts in that party's favor. *Spence v. Zimmerman,* 873 F.2d 256, 257 (11th Cir. 1989).

Thus, if a reasonable fact finder evaluating the evidence could draw more than one inference from the facts, and if that inference introduces a genuine issue of material fact, then the Court should not grant the summary judgment motion. *Augusta Iron and Steel Works v. Employers Insurance of Wausau,* 835 F.2d 855, 856 (11th Cir. 1988). It must be emphasized that the mere existence of *some* alleged factual dispute will not defeat an otherwise properly supported summary judgement motion. Rather, "the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A dispute about a material fact is "genuine" if the "evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* The inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251-52, 106 S. Ct. 2505.

The parties assert, and the Court agrees, that there is no genuine issue of material fact, and summary judgment is appropriate.

III. Analysis

A. Antitrust claims

Morris asserts four antitrust claims: 1) monopolization of the Internet markets, 2) unlawful refusal to deal, 3) monopoly leveraging, and 4) attempted monopolization of the Internet markets. Before addressing the elements of each of the antitrust claims, the Court will first address the PGA Tour's assertions that valid business reasons justify the exclusionary practice found in the OLSR, because valid business reasons are a defense to the antitrust claims. Once the PGA Tour asserts valid business justifications for its action, Morris bears the burden of proving that the proffered business justification is pretextual. *See U.S. Anchor Mfg., Inc. v. Rule Industries, Inc.*, 7 F.3d 986, 1002 (11th Cir. 1993).

Free-riding[13]

Morris asks the Court to force the PGA Tour to provide Morris with the compilation of scores, for which the PGA Tour spends considerable money and time creating, at no cost to Morris. While Morris does invest its own cost in re-keying the scores for syndication, Morris free-rides on the PGA Tour's efforts in compiling the scores. As Morris admits in its Memorandum of Law, "Morris cannot duplicate the functions of RTSS, which depends on the efforts of hundreds of volunteers each week." Even if it is the efforts of "volunteers", the PGA Tour has still invested time and

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[13] Free-riding is obtaining a benefit at another's expense without contributing to it. *See Garner, Black's Law Dictionary*, 7th ed. at 676.

money in the organization and technology to make RTSS possible.[14]

Morris contends that it is not free-riding and cites to the *Kodak*, Motorola, and *Aspen* cases. *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992); *Nat'l Basketball Ass. v. Motorola, Inc.*, 105 F.3d 841, 854 (2d Cir. 1997); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985). However, none of these cases is applicable to the instant case. In *Motorola*, the court found that Motorola did not free-ride when it created a network that disseminated scores from NBA basketball games. *See Motorola*, 105 F.3d at 854. Three distinctions between Motorola and the instant case make Morris's claim untenable. First, the *Motorola* court used a very high standard for free-riding that is applicable only in cases with the hot-news exception, which will be discussed in greater detail below. More importantly, the information that Motorola used to create its product was in the public domain, having been broadcast on television or radio. *See id.* at 843. Specifically, Motorola-paid reporters, who had heard the radio or television broadcast scores, reported the information to a central location and merely relayed what had been known to the world. *See id.* at 844. Golf, unlike basketball, precludes a single person gathering all the information occurring on all 18 holes. So when television and radio cover a basketball game[15], the score is presented to the public

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[14] Morris's claim that replication of RTSS would be socially wasteful belies its claim that it does not free-ride. Replication would be wasteful, precisely because the PGA Tour has invested time, money, and resources that Morris has not and does not wish to expend.

[15] Similarly, any single spectator at a basketball, baseball, or football game knows the score of the game, as all the action takes place within his or her sight.

through those media outlets, allowing Motorola to obtain the information and republish it. If Morris were able to gather scores from all 18 holes through a television or radio broadcast, Morris could then republish that information, absent a hot-news exception.[16] However, golf's atypical format prevents any single television or radio broadcast from providing results from all 18 holes live.[17] The PGA Tour does publish the scores in the media center,[18] but the media cannot disseminate that information except as the PGA Tour's press credentials allow them to do.[19] As a result, the scores, which are not protected by copyright, remain outside the public domain and within the PGA Tour's control, because the PGA Tour provides access with certain restrictions.[20] Finally, Motorola benefitted from the NBA's

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[16] As the Court finds the "hot-news" claim inapplicable, it does not address the five requirements to prove a "hot-news" claim. *See Motorola*, 105 F.3d at 845.

[17] Nor can a single spectator at a golf tournament know the score of all the players.

[18] The PGA Tour also publishes the scores of the top players to the spectators, who are present under a license from the PGA Tour which prevents their dissemination of the scores off the course.

[19] Currently, the PGA Tour allows Morris to publish the scores as quickly as it can re-key them from the media center, but the PGA Tour does not allow Morris to sell or syndicate that information. Also, a compiler of information can limit the dissemination of that information through contracts, including contracts found on tickets. *See ProCD Inc. v. Zeidenberg*, 86 F.3d 1447, 1451 (7th Cir. 1996)

[20] Even if the information were in the public domain, the PGA Tour would have the ability to limit the use of the information it provides to Morris under contract law. *See ProCD Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996)(holding that producers of a CD, consisting of the content of publicly available phone books, could, under contract law, enjoin

costs in producing and marketing the games and from the radio and television stations who paid for broadcast rights: that is Motorola capitalized on the NBA's positive externalities. However, the NBA and the broadcast stations had already reaped the profits of their investment, and the information was in the public domain at the moment of broadcasting. Additionally, once in the public domain, Motorola "expend[ed] their own resources to collect purely factual information generated in NBA games." *Id.* at 854. While here, Morris does not expend its own resources in gathering information, which is not in the public domain, but instead free-rides on the PGA Tour's compilation of scores.

Reliance on the *Kodak* case is similarly misplaced. Kodak claimed that the independent service providers (ISP) of Kodak's copiers free-rode on Kodak's investment in product development. *See Kodak,* 504 U.S. at 485, 112 S. Ct. 2072. "According to Kodak, the ISP's are free-riding because they have failed to enter the equipment and parts markets;" the Court rejected Kodak's free-riding claim. *Id.* However, this is not the type of free-riding that the PGA Tour is trying to prevent. The PGA Tour is not arguing that Morris free-rides on the PGA Tour's investment in the promotion of championship golf tournaments, but on its investment in the compilation of golf scores. Morris wants to commercially exploit information that the PGA Tour has expended money in gathering and has not reaped the full benefit possible from its investment.

Morris claims that the plaintiff in *Aspen* could not have won, if this Court accepts the PGA Tour's definition of free riding. However, *Aspen* was not a case about free riding, as the plaintiff ski company in *Aspen* did not free ride on defendant

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purchasers from selling the information, which was clearly in the public domain and not protected by copyright).

ski company's investments. The defendant, in *Aspen*, refused to sell plaintiff lift tickets at any price or even honor vouchers for tickets and discontinued a profitable joint arrangement with the plaintiff without a business justification. *See Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 594-95, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985). The plaintiff in *Aspen* was not free riding, because it was willing and attempted to pay for its customers to ski at defendant's resort.

Morris further argues that although even if it is free-riding on the collection of scores, antitrust law does not condemn such free-riding. The Court agrees with Morris in its assertion that free-riding on "positive externalities" is accepted by society and courts. *See Areeda, Antitrust Law,* Vol. III, ¶ 1613(b). However, what Morris seeks is not a positive externality. If Morris were selling the scores after the scores were released on a website, Morris would be benefitting from PGA Tour's positive externality, *i.e.*, the public's interest in information about championship golf.[21] As the near instantaneous scores are not in the public domain and as the PGA Tour maintains an interest in the score until they are in the public domain, the scores are not externalities until the PGA Tour has reaped its reward or forgone that possibility.

Morris additionally argues that even if there is free-riding, it must reach the level that would justify a "hot news" property right. However, the Court finds that to be a business justification free-riding does not have to reach the level that the *Motorola* court held necessary for a hot news exception. The *Motorola* court required the free-riding to be so pervasive that all incentives to undertake an activity would be lost. *See Motorola,* 105 F.3d at 853. However, to be a

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[21] Morris has been capitalizing on this type of externality, ever since it has included golf scores in its newspapers' sports sections.

valid business reason, a much lower level of free riding will justify excluding competitors. *See Areeda,* Antitrust Law, Vol. III, ¶ 658(f) ("once a proffered business purpose has been accepted as asserted in good faith and not as pretense, the defense does not require 'balancing' of social gains against competitive harms. . .").

Property Right in the Scores

The PGA Tour claims that the restrictions have a valid business justification, because they are necessary to protect a property right in the scores that it compiled by use of RTSS. Morris argues that the PGA Tour lacks a property right in the score, thus negating the claimed business justification. For the following reasons, the Court finds that the PGA Tour does have a property right in the scores compiled by the use of RTSS, but that property right vanishes when the scores are in the public domain.[22]

The PGA Tour's property right does not come from copyright law, as copyright law does not protect factual information, like golf scores. *See Feist Publications v. Rural Tel. Serv. Co.,* 499 U.S. 340, 348, 111 S. Ct. 1282, 113 L. Ed. 2d 358 (1991). However, the PGA Tour controls the right of access to that information and can place restrictions on those attending the private event, giving the PGA Tour a property right that the Court will protect.

In the early half of the 20th Century, the Supreme Court dealt with a similar issue in several cases, known as the "ticker cases". In *Board of Trade of the City of Chicago v. Christie Grain and Stock Company,* 198 U.S. 236, 25 S. Ct. 637, 49

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[22] The Court, in its discussion of free-riding *supra,* found that the information and scores when first published in the media center are not in the public domain.

L. Ed. 1031 (1905), the appellee sought an injunction preventing the use and distribution of "continuous quotations of prices on sales of grain." *See id.* at 245, 25 S. Ct. 637. There the Supreme Court held, "plaintiff's collection of quotations is entitled to the protection of the law. It stands like a trade secret. The plaintiff has the right to keep the work which it has done, or paid for doing, to itself . . .. The plaintiff does not lose its rights by communicating the result to persons, even if many, in confidential relations to itself, under a contract not to make it public." *Id.* at 250, 25 S. Ct. 637. The Supreme Court further stated, "[t]ime is of the essence in matters like this . . . if the contracts with the plaintiff are kept, the information will not become public property until the plaintiff has gained its reward. A priority of a few minutes probably is enough." *Id.* at 251, 25 S. Ct. 637.

In *Moore v. New York Cotton Exchange*, 270 U.S. 593, 46 S. Ct. 367, 70 L. Ed. 750 (1926), plaintiff sought an injunction forcing defendant to furnish plaintiff with a ticker and a declaration that defendant was a monopolist. *See id.* at 603, 46 S. Ct. 367. The Supreme Court held that the allegations did not support a claim under the Sherman Act and refused to grant the injunction. *See id.* at 603-05, 46 S. Ct. 367. The Supreme Court reiterated the holding of the *Christie* Court that the exchange had a property right in the information "which relates solely to its own business upon its own property." *Id.* at 606-07, 46 S. Ct. 367. Further, the exchange was able to determine to whom it will sell: "the ordinary right of a private vendor of news or other property." *Id.* at 605, 46 S. Ct. 367. Accordingly, the Court found that the exchange's actions were appropriate and legitimate to protect and to further its business. *See id.* at 606, 46 S. Ct. 367.

Like the "ticker cases", the instant case deals with facts that are not subject to copyright protection. The compiler of the information in both cases collects information, which it created, at a cost. Also the events occur on private property to which the general public does not have unfettered access, and the creator of the event can place restrictions upon those who enter the private property. The vastly increased speed that the Internet makes available does not change the calculus or the underlying property right. Accordingly, the PGA Tour, like the exchanges in the ticker cases, has a property right in the compilation of scores, but that property right disappears when the underlying information is in the public domain.

Broadcast Rights on the Internet

Whether the PGA Tour has a separate right to license or sell broadcast rights on the Internet, like sports and entertainment producers currently enjoy in dealing with television and radio, is a novel question. The Supreme Court indirectly addressed the issue in *Reno v. American Civil Liberties Union*, 521 U.S. 844, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997), when deciding the constitutionality of Communications Decency Act. In *Reno*, the Supreme Court held that the Internet, which the Supreme Court repeatedly referred to as a new medium, was not like traditional broadcast media, *i.e.*, television or radio. *Id.* at 867, 117 S. Ct. 2329. The Supreme Court distinguished the Internet and the radio transmission found in *FCC v. Pacifica Foundation*, 438 U.S. 726, 748-50, 98 S. Ct. 3026, 57 L. Ed. 2d 1073 (1978) based on three distinctions. First, the Internet has not historically been regulated by an agency familiar with the medium. Second, available frequencies on the Internet are not scarce as they are on radio. And finally, affirmative steps are required to access information on the Internet. *See Reno,*

521 U.S. at 868-69, 117 S. Ct. 2329. The Supreme Court concluded that because of these differences, Congress cannot regulate the Internet the same way it can regulate radio.

However, none of those differences mandates treating the Internet differently from radio or television in terms of property rights. Whether the government can regulate the Internet does not limit the value of Internet broadcasting or provide a rationale for restricting the use of that information. Both parties would certainly agree that the Internet provides an opportunity to profit from a product by selling advertisement. Television, radio, and print media operate on a similar, if not identical, principle: the selling of advertisement to viewers, listeners, or readers of entertainment, be it sports, entertainment, or news.[23] Therefore, the Court finds that the PGA Tour has a right to sell or license its product, championship golf, and its derivative product, golf scores, on the Internet in the same way the PGA Tour currently sells its rights to television broadcasting stations.[24]

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[23] In *Bruce v. Weekly World News, Inc.*, 150 F. Supp. 2d 313 (D. Mass. 2001), the court accepted the opinion of both sides' experts who agreed that the Internet was a separate medium, distinct from print media, requiring a separate license for use on the Internet. The court awarded additional damages because of the infringing use on the Internet. *Id.* at 321. If a separate license is required to use a copyrighted picture on the Internet, the producers of a marketable product, like golf scores, should also be able to sell rights on that new medium.

[24] With the emergence of "web-casting" and "streaming" video and other rapid advancements in technology, a negative answer to the question of whether the PGA Tour has broadcast rights on the Internet would stymie advancement and reduce incentive to create entertainment and sports programming by foreclosing a lucrative market. *See generally, Kellis, Note: A new Technology Question of Olympic Proportions: Should NBC's License to Broadcast the Games Include Internet Broadcasting Rights?*, 8 J. Intell. Prop. L. 245 (2001). To hold otherwise would be

Accordingly, the Court finds that the PGA Tour is justified in its restrictions because (1) Morris free-rides on the PGA Tour's efforts, (2) the PGA Tour has a property right in the scores before they are in the public domain, and (3) the PGA Tour has the right to license or sell broadcasting rights of its products over the Internet.

Monopolization of the Internet Markets

Monopolization, an offense under Section 2 of the Sherman Act, requires two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Eastman Kodak Co. v. Image Tech. Services Inc.*, 504 U.S. 451, 481, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992).

1) Possession of Monopoly Power

Morris argues that the PGA Tour has monopoly power in the relevant market, real-time golf scores, and that power is evidenced by a reduction in output, citing *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984). Morris misreads the import of that decision. In *NCAA*, the district court found that absent the NCAA's regulation more college football games would be broadcast, and therefore the restrictions limited output. *See id.* at 119, 104 S. Ct. 2948. In the instant case, Morris argues that the PGA Tour's restrictions have reduced output as

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similar to a court finding that Major League Baseball could not sell broadcasting rights to television stations in the 1940s with the advent of television.

evidenced by the reduced number of web sites with real-time golf scores. Morris misconstrues outlets with output. Although the number of web sites with real-time golf scores might be reduced, the output of the product is not. Output is restricted in the same manner as an exclusive television broadcast contract: only one station is broadcasting any given tournament. Certainly there would be greater output if two television stations broadcast the golf tournament at the same time, but this is not the output reduction condemned by the *NCAA* court. There the Supreme Court's concern was the number of games being broadcast, not the number of stations broadcasting a single game. Morris further argues that when the PGA Tour's web site does not work, viewers have no access to real-time golf scores on the Internet. The Court disagrees with that argument, as the logical conclusion would be to force the PGA Tour to allow several television stations to broadcast a tournament, because occasionally one of the stations has technical difficulties. Output has not been reduced, and consumers have not been harmed, evidencing an absence of monopoly power exerted by the PGA Tour.[25]

2) Willful acquisition or maintenance of that power

"Liability [on the second element of a § 2 claim] turns, then, on whether valid business reasons can explain" those actions. *See Kodak* at 483, 112 S. Ct. 2072. As the Court has already found legitimate business reasons, Morris fails to meet the second element of a § 2 claim.

As Morris has failed to prove either element of a § 2 claim as a matter of law, the PGA Tour's motion for summary

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[25] Whether it would be a violation of antitrust law for the PGA Tour to be the sole outlet of golf scores on the Internet without offering to sell or license that information is not a question before the Court.

judgment on Morris's claim of monopolization of the Internet markets is **GRANTED**.

Unlawful Refusal to Deal

Under certain circumstances, a unilateral refusal to deal may constitute an antitrust violation. *See Mr. Furniture Warehouse, Inc. v. Barclays American/Commercial Inc.*, 919 F.2d 1517, 1522 (11th Cir. 1990). However, in order to prevail on a claim for refusal to deal, the plaintiff must show both the existence of monopoly power *and* anticompetitive intent. *See id.* ("It is clear that monopolistic or other anticompetitive intent is the key factor in determining whether a violation of § 2 has occurred."); *see also Mid-Texas Communications Systems, Inc. v. American Telephone & Telegraph Co.*, 615 F.2d 1372, 1388 (5th Cir. 1980); *Poster Exchange, Inc. v. National Screen Service Corp.*, 431 F.2d 334 (5th Cir. 1970). Courts have used two tests to determine whether a refusal to deal is a violation of antitrust law: intent test and essential facilities test.

1) Intent Test

"The intent test considers whether, under the circumstances of a case, a monopolist's conduct demonstrates an illegal intent to destroy competition." *Consolidated Gas of Fla., Inc. v. City Gas Co. of Fla.*, 912 F.2d 1262, 1302 (11th Cir. 1990). It is not just an intent to destroy competition, for that is the nature of a competitive market, but an illegal intent as evidenced by, "conduct that unnecessarily excludes or handicaps competitors." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 597, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985).

Morris asserts that *Aspen* controls the outcome of this case. Morris argues that, like in *Aspen,* the PGA Tour's restriction is a stark departure from past practice and against the PGA Tour's economic interest. The facts indicate that the PGA Tour's actions are a departure from the unfettered access previously granted to the media. However, where the defendant in *Aspen* refused to deal only in order to injure the plaintiff, offering no valid justification, the PGA Tour has provided valid business justifications. *See id.* at 610, 105 S. Ct. 2847; *see also Areeda, Antitrust Law,* Vol. IIIA, ¶ 773, pg. 211 ("A legitimate purpose renders any accompanying purpose irrelevant; regardless of motive no firm has a general duty to injure itself in order to benefit a rival.") Also, unlike in *Aspen,* the PGA Tour is not discontinuing a profitable joint arrangement with Morris like the defendant in *Aspen. See Areeda,* ¶ 658(f), pg 136 (arguing for a narrow reading of Aspen to unexplained interruptions of preexisting arrangement). The Court finds that the PGA Tour's actions do not unnecessarily exclude competition or handicap competitors, but are reasonable means to protect a valuable property right.

Also, Morris argues that the restrictions hurt the PGA Tour's interest by limiting the amount of press coverage of its tournament; Morris's claim is disingenuous at best. The PGA Tour's ability to profit from marketing its compilation of scores does not reduce the amount of coverage that the press has traditionally provided of the PGA Tour's tournaments. The posting of real-time golf scores on the Internet supplements traditional press coverage. The PGA Tour's restrictions, then, are not against its self-interest, as the PGA Tour has the traditional press coverage, plus the

coverage and income generated by the real-time scoring on the Internet.[26]

Consequently, the Court finds that although the PGA Tough might have an intent to harm a competitor, it is not an illegal intent.

2) Essential Facilities

The withholding of an essential facility is a violation of antitrust law, and an essential facility is one without which a competitor cannot enter or compete in a market. *See Covad Comm. Co. v. BellSouth Corp.*, 299 F.3d 1272, 1285-86 (11th Cir. 2002). An essential facilities claim requires a showing of four elements: 1) control of the essential facility by a monopolist, 2) competitor's inability to duplicate the facility, 3) denial of the facility, and 4) feasibility of providing the facility. *See id.*

Initially, the Court finds that access to the media center is not an essential facility. This Court can find no case to indicate that access to proprietary information, not in the public domain, is an essential facility. Although it may be true that Morris will not be able to compete as effectively with the PGA Tour without access to RTSS, that alone does not make access an essential facility. *See Alaska Airlines v. United*

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[26] Theoretically, the PGA Tour could limit the media's access to the tournament and the media center to those willing to pay a fee or to the one willing to pay the highest price. Although such a practice would be a departure from its past practice, it would not violate *Aspen*. The PGA Tour could justify the change with the business justification that the PGA Tour would be better off charging the press an access fee, than gaining the corollary benefit of increased publicity. A court would not be in a position to second guess the business model selected by a company, unless it unnecessarily excluded competitors.

Airlines, 948 F.2d 536, 544 (9th Cir. 1991) ("plaintiff must show more than inconvenience, or even some economic loss; he must show that an alternative to the facility is not feasible.") Additionally, other web sites, such as www.thegolfchannel.com, www.nbc.com, and www.golfonline.com, who do not have access to the media center, still compete with the PGA Tour's web site in the Internet distribution of golf scores. "Essentiality is not proven when actual or potential rivals other than the plaintiff are able to compete without the claimed facility. . .." *See Areeda,* Antitrust Law, Vol. IIIA, pg 204. Many competitors would compete more efficiently with access to proprietary information, but a court's role is not to force access to proprietary information in the name of competition, as that would reduce incentive to innovate and ultimately harm consumers. *See id.* Vol. III, pg 129 ("It would be inconsistent with patent policy to use the antitrust laws to dissipate monopoly power still resting entirely or almost entirely on the unexpired patents that first created it.")

Assuming *arguendo* that access to the media center is an essential facility, one who controls an essential facility must provide access "upon such just and reasonable terms and regulations as will, in respect of use, character, and cost of service, place every such company upon as nearly an equal plane as may be with respect to expenses and charges as that occupied by the proprietary companies." *United States v. Terminal R.R. Ass'n of St. Louis,* 224 U.S. 383, 411, 32 S. Ct. 507, 56 L. Ed. 810 (1912). However, in this case, Morris is seeking access to the media center and the scoring system at no cost, putting it at a competitive advantage to the PGA Tour.[27] The PGA Tour offers access to the scores through a

[27] If the Court were to rule for Morris, the Court would have to decide what price Morris would need to pay in order for it to be placed on an equal footing with the PGA Tour. Such rate making is not the appropriate

license as evidenced by its contract with USA Today, and Morris is free to negotiate for the purchase of a license which would put it on a competitive plane with the PGA Tour.

As this Court stated in its denial of a preliminary injunction, "it is not unlawful for a Defendant even one who possesses monopoly power- to refuse to deal with its competitors if there are legitimate pro-competitive reasons for that refusal." *Morris Communications Corp. v. PGA Tour, Inc.*, 117 F. Supp. 2d 1322 (M.D. Fla. 2000). As the Court finds that the PGA Tour's restrictions are justified and not against its economic self interest, Morris's claim under the intent test or essential facilities test cannot stand as a matter of law. Accordingly, the PGA Tour's motion for summary judgment on Morris's claim of unlawful refusal to deal is GRANTED.

Monopoly Leveraging

Monopoly leveraging refers to a monopolist's use of its market power to gain a competitive advantage in a different level or in a different market. *See Consolidated Gas Company of Florida, Inc. v. City Gas Company of Florida*, 912 F.2d 1262, 1284-85 (11th Cir. 1990) (Tjoflat, C.J., dissenting). Neither the Eleventh Circuit nor the Supreme Court has accepted this theory of antitrust violation, and the Court finds that it is unnecessary to determine its applicability in the instant case. *See Aquatherm Industries Inc. v. Florida Power and Light Co.*, 971 F. Supp. 1419, 1432 (M.D. Fla. 1997).

Under the Second Circuit's analysis of monopoly leveraging, a plaintiff must make a showing of anticompetitive intent or

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role for a court. *See generally, Consolidated Gas Co. of Florida v. City Gas Co.*, 912 F.2d 1262, 1320 (11th Cir. 1990) (Tjoflat, C.J. dissenting).

an unlawful exercise of power. *See Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 272-75(2d Cir. 1979). As the Court found *supra*, the PGA Tour's conduct is not anti-competitive nor an unlawful exercise of power. Although it might harm Morris, the conduct is an attempt to protect proprietary information and avoid free-riding by a competitor. Accordingly, the PGA Tour's motion for summary judgment on Morris's claim of monopoly leveraging is **GRANTED**.

Attempted Monopolization of the Internet Markets

Attempted monopolization has three elements: 1) the defendant's specific intent to achieve monopoly power through predatory or exclusionary conduct, 2) the defendant engages in such conduct, and 3) there exists a dangerous probability that the defendant will succeed. *See U.S. Anchor Mfg., Inc. v. Rule Indus., Inc.*, 7 F.3d 986, 994 (11th Cir. 1993). "Specific intent does not merely mean intent to prevail over ones rivals; it goes beyond that to include an intent to control prices or to restrain competition unreasonably." *General Industries Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 801 (8th Cir. 1987). The Court will not address elements two or three, as it finds the first element dispositive.

A finding of legitimate pro-competitive business reasons forecloses a finding of predatory or exclusionary conduct. *See Technical Resource Services, Inc., v. Dornier Medical Systems, Inc.*, 134 F.3d 1458, 1467 (11th Cir. 1998) ("A defendant can escape § 2 liability if the defendant's actions can be explained by legitimate business justifications.") As the Court has already found the PGA Tour's conduct justified by legitimate business reasons, the PGA Tour's Motion for

Summary Judgment on Morris's claim of attempted monopolization is **GRANTED**.

B. Florida Deceptive and Unfair Trad Practice Act Claims

Along with the antitrust claims, Morris brings a claim under the Florida Deceptive and Unfair Trade Practice Act (FDUPTA), Section 501.201, *et. seq.* FDUPTA defines violation of the act in subsection 501.203(3), as "any violation of this act and may be based upon any of the following:(a) Any rules promulgated pursuant to the Federal Trade Commission Act, *15 U.S.C. s. 41* et seq. or this act; (b) The standards of unfairness and deception set forth and interpreted by the Federal Trade Commission or the federal courts; (c) Any law, statute, rule, regulation or ordinance which proscribes unfair methods of competition, or unfair, deceptive, or unconscionable acts or practices." *Mack v. Bristol-Myers Squibb Co.*, 673 So.2d 100, 103-04 (Fla. 1st DCA 1996). FDUPTA is to be construed consistently with antitrust law. *See id.*, at 103. Morris is correct in its assertion that FDUPTA is not limited to antitrust violations, but Morris points only to antitrust law as a foundation for its FDUPTA claim. As this Court has found no violation of antitrust law and as Morris asserts no other basis for a claim under FDUPTA, the PGA Tour's Motion for Summary Judgment on Morris's FDUPTA claim is **GRANTED**.

C. Claim of Tortious Interference

The PGA Tour raises three reasons for its Summary Judgment Motion, but the Court will only address the last: the PGA Tour's actions were justified and not actionable. Florida courts recognize that, "If a defendant interferes with a contract in order to safeguard a preexisting economic interest

of his own, the defendant's right to protect his own established economic interest outweighs the plaintiff's right to be free of interference, and his actions are usually recognized as privileged and nonactionable". *Heavener, Ogier Servs. Inc., v. R.W. Florida Region Inc.*, 418 So. 2d 1074, 1076 (Fla. 5th DCA 1982); *see also Johnson Enterprises of Jacksonville, Inc. v. FPL Group, Inc.*, 162 F.3d 1290, 1321 (11th Cir. 1998); *Ethyl Corp. v. Balter*, 386 So. 2d 1220, 1224 (Fla. 3d DCA 1980). As the Court has already found the PGA Tour's actions were designed to protect its property interest and not improper, the Court finds that the PGA Tour's actions are privileged. Accordingly, the PGA Tour's Motion for Summary Judgment on Morris's claim of tortious interference is **GRANTED**.

IV. Conclusion

As discussed above, the PGA Tour's Motion for Summary Judgment on all of Morris's claims is **GRANTED**. Because Morris's Motion addresses the same issues which the Court has discussed above, Morris's Motion for Partial Summary Judgment on liability is **DENIED**.

The clerk shall enter judgment accordingly and close the file. Further, the PGA Tour's Motion to Continue Trial (Doc. No. 167, filed December 4, 2002) is **DENIED** as moot.

Appendix C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-10226-CC
No. 03-11502-CC

MORRIS COMMUNICATIONS CORP.,
a Georgia Corporation,
Plaintiff-Appellant,

versus

PGA TOUR, INC.,
Defendant-Appellee.

On Appeal from the United States District Court for the
Middle District of Florida

[Stamped Filed May 28, 2004]

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC (Opinion _____, 11 Cir., 19__, _____ F.2d _____).

Before: EDMONDSON, Chief Judge, DUBINA and COX, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules

of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/
UNITED STATES CIRCUIT JUDGE

Appendix D

STATUTORY PROVISONS INVOLVED

United States Code Annotated
Title 15. Commerce and Trade
Chapter 1. Monopolies and Combinations in Restraint of Trade

§ 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

United States Code Annotated
Title 17. Copyrights
Chapter 3. Duration of Copyright

§ 301. Preemption with respect to other laws

(a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether

created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

(b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to--

(1) subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression; or

(2) any cause of action arising from undertakings commenced before January 1, 1978;

(3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106; or

(4) State and local landmarks, historic preservation, zoning, or building codes, relating to architectural works protected under section 102(a)(8).

(c) With respect to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of any State shall not be annulled or limited by this title until February 15, 2067. The preemptive provisions of subsection (a) shall apply to any such rights and remedies pertaining to any cause of action arising from undertakings commenced on and after February 15, 2067. Notwithstanding the provisions of section 303, no sound recording fixed before February 15, 1972, shall be subject to copyright under this title before, on, or after February 15, 2067.

(d) Nothing in this title annuls or limits any rights or remedies under any other Federal statute.

(e) The scope of Federal preemption under this section is not affected by the adherence of the United States to the Berne Convention or the satisfaction of obligations of the United States thereunder.

(f)(1) On or after the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990, all legal or equitable rights that are equivalent to any of the rights conferred by section 106A with respect to works of visual art to which the rights conferred by section 106A apply are governed exclusively by section 106A and section 113(d) and the provisions of this title relating to such sections. Thereafter, no person is entitled to any such right or equivalent right in any work of visual art under the common law or statutes of any State.

(2) Nothing in paragraph (1) annuls or limits any rights or remedies under the common law or statutes of any State with respect to--

(A) any cause of action from undertakings commenced before the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990;

(B) activities violating legal or equitable rights that are not equivalent to any of the rights conferred by section 106A with respect to works of visual art; or

(C) activities violating legal or equitable rights which extend beyond the life of the author.

Appendix E

MEDIA RELATIONS POLICIES AND PROCEDURES

* * * *

INTERNET CREDENTIAL POLICY

No online service will be allowed "real time" transmission of any intercollegic sporting event which is hosted by a Southeastern Conference Institution. Only contractual rights-fee paying media will be allowed "real time" transmission during the event. "Real time" is defined as any online media providing live continual play-by-play coverage of an event. Other than the official website of each participating institution, the Southeastern Conference and contractual rights-fees paying media, representatives staffing web sites shall be accredited for SEC sporting events on the following guidelines:

A. One credential may be assigned to a website that is allowed with a national media of another form (i.e. network, newspaper, etc.)

B. All other credential requests from internet providers may be approved on a space available basis by the host institution.

All internet websites, receiving credentials to SEC athletic events, shall not pose any game footage, statistics or game information on any website (other than that of Associated Press, institutional or SEC websites or the contractual rights-fee paying media website) for 30 minutes following the conclusion of the contest.

OFFICES

The SEC Sports Information Directors shall elect a vice-chairman every two years, who will automatically become chairman for a two-year term. The chairman shall preside over meetings of the Sports Information Directors and will serve as a spokesman for the group during the year. Officers for the 2000-2001 term are: Debby Jennings, Tennessee (President) and Rod Williamson, Vanderbill (Vice-President)

PHOTOGRAPHERS IN BENCH AREA

According to NCAA policies, the presence of any type of photographer (television or still) in the bench area for all sports is strictly prohibited. According to the NCAA Football Rules and Interpretations Manual (Rule I, Section 2, Article 4b): "The team area shall be limited to squad members in uniform and a maximum of 40 other individuals directly involved in the game. The 40 individuals not in uniform shall wear special identification," (Rule 1, Section 2, Article 4a): "No media personnel, including journalists, radio and television personnel, or their equipment, shall be in the team area or coaching box, and no media personnel shall communicate in anyway with persons in the team area or coaching box."

PLAYERS OF THE WEEK

The conference will name "Players of the Week" in the all conference-sponsored sports sports, allowing for co-players when the situation warrants. In the sport of football, an offensive and defensive player will be named each week and in the sports of baseball and softball, a player and pitcher of the week will be honored.

Each school may nominate a player for these weekly awards. The Media Relations Department staff will select the player of the week based on these nominations.

POOL REPORTERS

A pool reporter will be designated for the SEC Men's and Women's Basketball Tournaments by the Media Coordination Committee to obtain a rules interpretation if needed, regarding a game situation from the game officials. The pool reporter will be accompanied to the officials' dressing room by a representative of the SEC office. At that time, an interpretation pertaining exclusively in the specific situation will be given.

PRO SCOUTS

It is strongly recommended that pro scouts for football and basketball be given an opportunity to purchase a regular ticket to a school's game. However, it is recognized that some schools have extremely "tight" ticket situations and may be forced to issue media credentials to pro scouts.

PUBLIC ADDRESS ANNOUNCERS

PA Announcers may not be "cheerleaders' or used to incite the crowd during a game. The PA system may not be used by cheerleaders once the game has started. League PA Announcers are expected to exhibit professionalism at all times.

RADIO/TV CALL-IN SHOWS/INTERNET

An SEC student-athlete with eligibility remaining MAY NOT participate in any live radio/w show(call-in, etc.) other than during a regularly scheduled newscast and for no longer than four minutes, except as required by network television contractual commitments. This policy is in effect year-round and does not apply to international networks. It also applies to Internet chat rooms that are sponsored by a media outlet for the sole purpose of conducting question and answer sessions with the viewing public concerning the student-athlete's athletic career.

* * * *

MOTION FILED
SEP 17 2004

(1)

No. 04-266

In the Supreme Court of the United States

MORRIS COMMUNICATIONS COMPANY, LLC,

Petitioner,

v.

PGA TOUR, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF OF AMICI CURIAE AMERICAN SOCIETY OF NEWSPAPER EDITORS; ASSOCIATED PRESS SPORTS EDITORS; BELO CORP.; COX ENTERPRISES, INC.; FLORIDA PRESS ASSOCIATION; FLORIDA SOCIETY OF NEWSPAPER EDITORS; GEORGIA PRESS ASSOCIATION; KNIGHT-RIDDER, INC.; MEDIA GENERAL, INC.; MEDIANEWS GROUP INC.; NATIONAL PRESS CLUB; NEWSPAPER ASSOCIATION OF AMERICA; ONLINE NEWS ASSOCIATION; ONLINE PUBLISHERS ASSOCIATION; REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS; THE E.W. SCRIPPS COMPANY; THE NEW YORK TIMES COMPANY; AND THE WASHINGTON POST COMPANY IN SUPPORT OF PETITION FOR CERTIORARI

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September 17, 2004

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

STATEMENT PURSUANT TO RULE 29.6

Berkshire Hathaway, Inc., a publicly held company, has a 10% or greater ownership in The Washington Post Company.

Private Capital Management beneficially owns more than 10% of the common stock of Belo Corp.

None of the remaining *amici* have a parent corporation, and no publicly held company owns 10% or more of the stock of any of the remaining *amici*.

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

The *amici curiae* respectfully request leave to file the attached brief pursuant to Court Rule 37.2. Petitioner has consented to the filing of this brief in a letter filed with the Clerk. Respondent has withheld consent.

The *amici curiae* consist of a broad array of news organizations and trade associations that represent newspapers, journalists and online publishers throughout the country. (The *amici* are more fully described in the Statement of Interest below.) *Amici* have filed this brief because of their shared belief that the Eleventh Circuit decision poses a serious threat to the freedom of the press and to the efficient distribution of information on the Internet.

The question presented in this case is whether a newsmaker may privatize non-copyrightable facts that are already in the public domain. This case may arise in the context of the sports industry, but the Eleventh Circuit's decision is not so limited. By its terms, the court's decision would allow any newsmaker to condition access in an effort to limit or manipulate the reporting of political, financial, and other events of public importance. This case is also of fundamental importance insofar as it directly implicates the ownership, and control, of information on the Internet. Because the Eleventh Circuit's resolution of this case would have a severe impact upon the operations of news publishers, the *amici* have a substantial interest in ensuring that this Court, in reviewing the petition for certiorari, fully appreciates the issues at stake.

This Court's copyright decisions make clear that the First Amendment prohibits the ownership of information. *See, e.g.*, *Feist Publ'ns v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991); *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985). Copyright may guarantee the creator's right to the particular mode of expression, but it does not grant the creator ownership over the underlying ideas, or facts, that are

described. Those are part of the public domain and may be reported without restriction. The court of appeals' decision upsets the constitutional balance between copyright and the First Amendment, and in so doing, threatens to undermine the efficient dissemination of information, both on the Internet and elsewhere.

Because the court of appeals' decision is contrary to the freedom of information that lies at the heart of a free press, and because the decision would impose a significant threat to *amici*'s ability to report events of public importance in real time, *amici* seek leave to file this brief as amicus curiae.

Respectfully submitted,

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INTEREST OF AMICI CURIAE

The interest of the *amici curiae* is described in the foregoing Motion for Leave to File.[1] The *amici curiae* consist of eighteen news organizations and news-industry associations, who operate throughout the country. *Amici* have filed this brief because of their shared belief that the Eleventh Circuit decision poses a serious threat to the freedom of the press and to the efficient distribution of information on the Internet.

The American Society of Newspaper Editors ("the Society") is a professional organization of approximately 800 persons who hold positions as directing editors of daily newspapers in the United States and Canada. The purposes of the Society include assisting journalists and providing an unfettered and effective press in the service of the American people.

Associated Press Sports Editors is a group of sports editors for more than 400 newspapers throughout the United States and Canada.

Belo Corp. is one of the nation's largest media companies with a diversified group of market-leading television, newspaper, cable and interactive media assets. Belo operates news and information franchises in Texas, the Northwest, the Southwest, Rhode Island and the Mid-Atlantic region. Belo owns 19 television stations; owns or operates seven cable news channels; and manages one television station through a local marketing agreement. Belo's daily newspapers include The Dallas Morning News, The Providence Journal, The Press-Enterprise (Riverside, CA) and the Denton Record-Chronicle (Denton, TX). Belo Interactive's new media businesses include more than 30 websites, several interactive alliances and a broad range of Internet-based products.

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[1] Pursuant to S. Ct. R. 37.6, the undersigned counsel for the *amici curiae* states that they alone authored this brief, and no other persons or entities made any monetary contribution to its preparation or submission.

Cox Enterprises, Inc. publishes the Atlanta-Journal Constitution and, through subsidiaries, owns 17 daily and 25 non-daily newspapers, 15 television stations, 78 radio stations and cable television systems reaching over 6 million subscribers.

Florida Press Association is an organization that represents the interests of 45 daily newspapers and 154 weekly newspapers of general circulation throughout the state of Florida.

Florida Society of Newspaper Editors is an association dedicated to advancing the cause of responsible journalism by promoting and protecting freedom of information and public access in Florida; by advocating news coverage that serves the public interest and reflects the diversity of Florida's various communities; by encouraging adherence to the highest journalistic standards; and, by recognizing outstanding journalistic achievement in Florida.

Georgia Press Association is an organization that represents the interests of 33 daily newspapers and 118 weekly newspapers of general circulation in the state of Georgia.

Knight-Ridder, Inc. is the nation's second-largest newspaper publisher, with products in print and online. The company publishes 31 daily newspapers in 28 U.S. markets, with a readership of 8.7 million daily and 12.6 million Sunday. The company's Internet operation, Knight Ridder Digital, develops and manages the company's online properties. It is the founder and operator of Real Cities (www.RealCities.com), the largest national network of city and regional websites in more than 100 U.S. markets. Knight Ridder and Knight Ridder Digital are headquartered in San Jose, California.

Media General, Inc. ("MGI") is a communication company situated primarily in the Southeast, with interests in newspapers, television stations, interactive media and diversified information services. MGI's publishing assets include 25 daily newspapers, interests in approximately 100

other periodicals, 26 network-affiliated television stations, and more than 50 on-line enterprises.

MediaNews Group Inc. ("MNG") is the corporate parent of several companies that publish and distribute newspapers. MNG is the seventh largest newspaper publisher in America and has 40 market dominant daily, and approximately 65 non-daily newspapers in eight states.

The National Press Club, established in 1908, is an organization of journalists and communicators in Washington, D.C., and around the world. It advocates on behalf of First Amendment, press freedom and press access issues, and works to advance the professional standards of journalists.

The Newspaper Association of America is a non-profit organization that represents the interest of more than 2,000 newspapers in the United States and Canada. NAA members account for nearly 90 percent of the daily newspaper circulation in the United States. NAA has no direct interest in the outcome of this litigation. One of NAA's key priorities, however, is to protect the First Amendment rights of newspapers, including their ability to gather facts and report newsworthy events.

The Online News Association ("ONA") is the premier organization of people who make their livings gathering or producing news for digital presentation. ONA's professional members include news writers, producers, designers, editors, photographers, and others who produce news for distribution over the Internet and through other digital media.

Online Publishers Association is an industry trade organization dedicated to representing high-quality online content providers before the advertising community, the press, the government and the public.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom

of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since1970.

The E.W. Scripps Company is a diverse media company with interests in newspaper publishing, Internet publishing, broadcast television and national television networks. The company's 21 daily newspapers have a combined paid daily circulation of 1.1 million. E. W. Scripps also operates 15 broadcast television stations, four cable and satellite television programming networks, a television retailing network and a variety of websites.

The New York Times Company is the owner of The New York Times, The Boston Globe, The International Herald Tribune, 16 other newspapers, eight network-affiliated television stations, two New York City radio stations and more than 40 websites.

The Washington Post Company is a diversified media and education organization whose principal operations include newspaper and magazine publishing, television broadcasting, cable television systems, electronic information services, test preparation and educational and career services. The company owns The Washington Post, The Herald (Everett, Washington), The Gazette Newspapers, Newsweek, Newsweek International, television stations in Houston, San Antonio, Detroit, Miami, Jacksonville and Orlando, washingtonpost.com, newsweek.com and cable systems serving subscribers in 19 midwestern, western and southern states.

SUMMARY OF ARGUMENT

The question presented in this case is whether a newsmaker may privatize non-copyrightable facts that are already in the public domain. This case arises in the context of the sports industry, where the avid interest of fans in real-time reporting gives the facts in question a substantial economic value. The

Eleventh Circuit's rationale is not so limited, however, and by its terms, it would allow any newsmaker to control access to information and so shape the reporting of political, financial, and other events of public importance. The notion that the organizer of a political convention, for example, could condition media access upon the press's agreement not to report certain events, or to subject their stories to advance clearance, is a notion that is deeply antithetical to our nation's firm commitment to a free press and a vigorous public debate. Yet this is the import of the Eleventh Circuit's decision.

This case is also of fundamental importance insofar as it directly implicates the ownership of information on the Internet. The advent of the Internet has proven to be a tremendous boon to the efficient and quick distribution of information. The Internet has made it possible for every individual to become a news publisher, as the proliferation of online journals and weblogs has demonstrated. The Internet also has allowed established news organizations to expand the content of their publications and to present their reporting in "real-time," rather than waiting for the early morning run of the printing press.

The promise of the Internet, however, depends in part upon the fact that information lies in the public domain. Authors may have a legitimate copyright interest in their mode of expression, but the "free communication of facts" is guaranteed by the First Amendment. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985). The court of appeals' decision threatens this constitutionally required balance by granting the PGA Tour a "property interest" in the golf scores produced during their tournaments. Pet. App. 13a n.13. That holding is contrary to the fundamental principle that facts are part of the public domain, because it allows newsmakers to privatize the underlying facts of newsworthy events. Newsmakers have no legitimate interest in controlling the publication of factual information, regardless of whether it is "unfair that much of the fruit of the compiler's labor may be

used by others without compensation." *Feist Publ'ns v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991). The court of appeals' decision is contrary to the freedom of information that lies at the heart of a free press; it deepens an existing circuit split; and it would impose a significant threat to *amici*'s ability to report events of public importance in real time and without restriction. *Certiorari* is therefore warranted.

REASONS FOR GRANTING THE WRIT

I. BY ALLOWING A NEWSMAKER TO PRIVATIZE FACTS IN THE PUBLIC DOMAIN, THE COURT OF APPEALS' DECISION UPSETS THE CONSTITUTIONAL BALANCE BETWEEN COPYRIGHT LAW AND THE FIRST AMENDMENT.

Put simply, the decision below permits the PGA to *privatize facts*. The court of appeals held that the "PGA has a right to control its property interest in ... the compiled golf scores ...." Pet. App. 13a n.13. Despite the court of appeals' insistence to the contrary, this case is most certainly not just "a straightforward antitrust case." *Id.* at 7a.

This is a case of profound significance precisely because the court of appeals recognized an ownership interest in what this Court has held cannot be owned. In *Feist Publications v. Rural Telephone Service Company*, 499 U.S. 340 (1991), this Court recognized that factual information must be a part of the public domain. This is not merely a product of the interpretation of the Copyright Act. It is a "constitutional requirement." *Id.* at 346. *Feist* therefore refused to allow a phone company to maintain "'a monopoly in yellow pages advertising'" through its ownership of the underlying directory information. *Id.* at 343 (citation omitted). The court of appeals held, however, that the PGA could legitimately seek to maintain a monopoly in real-time golf-scores. This decision contravenes *Feist*, and in so doing, it permits the privatization of information in a manner that is deeply troubling to the freedom of the press.

A. This Court Has Recognized That The Constitution Strikes A Balance Between The First Amendment And The Copyright Clause.

It is well-established in the jurisprudence of this Court that the Copyright Clause and the First Amendment freedom of speech do not concern entirely separate spheres. The Copyright Clause, as enforced by Congress, grants authors the rights to control their own artistic expressions in a way that can, and at times must, infringe upon the speech of others. The copyright owner literally can silence others by prohibiting them from making use of a copyright-protected expression without the owner's consent. If extended beyond its proper bounds, copyright would threaten the freedom of speech.

This Court therefore has repeatedly recognized that there is a delicate, and constitutionally necessary balance, between the rights copyright grants creators and the speech rights of others. *See, e.g., Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) ("copyright law contains built-in First Amendment accommodations"). That balance is the dichotomy between information and expression. *See Harper & Row,* 471 U.S. at 556 (emphasizing that copyright's dichotomy between unprotected facts and ideas, on the one hand, and protected expression, on the other, "'strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression.'") (citation omitted).[2] Copyright doctrine

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[2] *See also Goldstein v. California*, 412 U.S. 546, 571 (1973) (approving the delicate balance struck between the First Amendment and copyright law where "[n]o restraint has been placed on the use of an idea or concept; rather, petitioners and other individuals remain free to record the same compositions in precisely the same manner and with the same personnel as appeared on the original recording"); *Zacchini v. Scripps-Howard Broad.Co.*, 433 U.S. 562, 577 n.13 (1977) (the balance between the First Amendment and copyright law requires that "[n]o restraint can be placed on the use of an idea or concept") (internal quotation marks omitted); 1 Melville

"assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work." *Feist*, 499 U.S. at 349-50.

This Court affirmed this distinction in *Feist*, when it held without dissent, that a telephone company could not prohibit others from copying the factual information contained in its telephone directory. 499 U.S. at 343. The Court rejected the argument that the telephone company's hard work in compiling the telephone listings precluded a publishing company from copying the raw data contained in the listings. Even though the telephone company "may have been the first to discover and report the names, towns, and telephone numbers of its subscribers, ... this data [did] not 'owe its origin' to" the telephone company. *See id.* at 361 (citation omitted). The raw facts were a part of the public domain, just as "'information respecting current events ... is a report of matters that ordinarily are *publici juris*.'" *Id.* at 353-54 (quoting *International News Serv. v. Associated Press*, 248 U.S. 215, 234 (1918)).

The Court thus rejected a "sweat of the brow" rule that would give ownership of facts to those who compile them. Such a rule would turn the fact/expression dichotomy on its head, *see id.* at 350, and it would "create[] a monopoly in public domain materials without the necessary justification of protecting and encouraging the creation of 'writings' by 'authors,'" as required by the Constitution. *Id.* at 354 (quoting 1 Melville B. Nimmer & David Nimmer, *Nimmer On Copyright* § 3.04, p.3-23 (1990)).

Copyright law protects the originality of expression. It does not allow a party to claim that time and money spent gathering facts in the public domain justifies private control over those facts. *See Feist*, 499 U.S. at 350; 1 Melville B. Nimmer &

B. Nimmer & David Nimmer, *Nimmer on Copyright* § 1.10[B][2], p. 1-141 (2004) ("a definitional balance between the First Amendment and Copyright must assure the unfettered communication of ideas and facts.").

David Nimmer, *Nimmer on Copyright* § 1.10[B][2] n.45.2 (2004) ("copyright law never restricts access to *information*, as opposed to the expression of that information," because that would be a "serious encroachment on First Amendment values") (original emphasis). This is fundamental, because the fact/expression dichotomy is the means by which copyright and free speech rights strike a balance.

B. The Court Of Appeals' Decision Expressly Authorizes A Newsmaker To Monopolize Public Facts.

The court of appeals' decision casts aside the fact/expression dichotomy by holding, contrary to *Feist*, that facts—here golf scores—are not part of that public domain. The court of appeals concluded that the PGA has the "right to control" the "compiled golf scores" and therefore cannot be held liable in antitrust for its efforts to preserve its monopoly over those facts. Pet. App. 13a n.13. According to the court of appeals, *Feist* had no relevance here because Morris Communications had filed an *antitrust* suit. *See id.* at 6a-7a.

This defies logic. The First Amendment principle underlying *Feist* does not depend upon the nature of the lawsuit. The bottom line remains the same: The PGA has no right to control the distribution of facts. Yet, this is precisely what the Eleventh Circuit held the PGA had a "valid interest" in doing. The Eleventh Circuit's decision is in direct conflict with this Court's holding that the "sweat of the brow" does not justify the privatization of facts, and it deepens a circuit split over whether a party can privatize facts by imposing contractual restrictions on dissemination. *Compare id.*; *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996); *Bowers v. Baystate Techs., Inc.*, 320 F.3d 1317 (Fed. Cir. 2003), *cert. denied*, 539 U.S. 928 (2003), *with Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255 (5th Cir. 1988); *RCA Mfg. Co. v. Whiteman*, 114 F.2d 86 (2d Cir. 1940) (L. Hand, J.).

The PGA prohibits media organizations covering its golf tournaments from compiling and publishing real-time golf scores. It does so by giving press credentials only to those news organizations that accede to the ban, and by allowing only PGA volunteers to use walkie-talkies, handheld communication devices or cell phones on the golf course. Pet. App. 2a-4a. Those volunteers man each hole on the golf course and relay the scores to "leaderboards" and to the media center. *Id.* at 2a. Because of the PGA's "walkie-talkie ban," Morris Communications could not gather the scores on its own; so it instead relied upon the scores PGA volunteers sent to the media center. Morris employees verified the accuracy of the displayed scores and then published the verified scores on its website and to commercial partners. Pet. 4. At first, the PGA had no objection as Morris published real-time golf scores on its Internet website. Pet. App. 3a n.1. Presumably the PGA recognized that the Internet was a powerful tool that Morris was using to bring news of the game immediately to golf fans across the nation.

But the PGA apparently determined that it could generate more profits by exercising exclusive control over when and to whom the golf scores were disseminated. The PGA thus imposed new restrictions prohibiting Morris Communications from publishing the golf scores in real time. Morris was told it had to wait until the PGA published the scores on its own website (which it apparently did not always do in real time) or until a half hour had elapsed. *Id.* at 3a-4a & n.1. The PGA thus asserted ownership over factual information that belonged in the public domain.

The court of appeals held that the PGA could not be held liable for maintaining a monopoly over these golf scores, because the PGA could legitimately require that Morris "purchase" the golf scores in order to prevent Morris from *free riding* on the PGA's "investment" in compiling the scores. *See*

Pet. App. 12a-13a.[3] The court of appeals' decision allows the PGA to control indisputably factual information based solely on the PGA's so-called "valid" interest in preventing Morris from free-riding on the fruits of the PGA's labors.

That conclusion was essential to its resolution of the antitrust claims at issue in this case, but it is directly contrary to *Feist*'s holding that the sweat of the compiler's brow cannot justify the removal of facts from the public domain. *See Feist*, 499 U.S. at 350; *see also WCVB-TV v. Boston Athletic Ass'n*, 926 F.2d 42, 45 (1st Cir. 1991) (Breyer, J.) ("[T]he man who clears a swamp, the developer of a neighborhood, the academic scientist, the school teacher, and millions of others, each day create 'value' (over and above what they are paid) that the law permits others to receive without charge.").

The Eleventh Circuit purported to limit its decision by holding that *Feist* only prohibited a "sweat of the brow" defense in copyright cases but the question here arose in an antitrust case. But this Court's constitutionally required holding hardly applies only to a discrete set of "copyright" cases. Rather, this

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[3] Even if the PGA could ban the dissemination of public facts (which it cannot), it is difficult to understand how Morris Communications was free riding. Until the PGA imposed its ban, Morris was the leading innovator in Internet news coverage of real-time golf scores. Morris sought to disseminate golf scores as widely and quickly as possible, necessarily relying on the PGA's scores because the PGA refused to allow Morris to gather the scores on its own. Nor did the PGA incur any additional cost in compiling golf scores for Internet publication. The PGA compiled scores for spectators and players at its tournaments long before it publishes them on the Internet. Thus, the court of appeals' "free-riding" holding effectively allows a newsmaker to limit the news media's ability to gather the news (here, under the PGA's walkie-talkie ban) and then claim that the media's failure to gather the news (because of the walkie-talkie ban) justifies more onerous restrictions on their right to disseminate the news (the ban on publishing real-time golf scores on the Internet).

Court has recognized that the First Amendment principle at stake is an *issue* that can arise in a variety of different contexts.

Take, for example, the many ways in which this Court has applied the First Amendment freedom of speech. The First Amendment is the reason why a school board cannot point to a teacher's political views as the reason for his termination, *see Pickering v. Board of Ed. of Tp. High Sch. Dist. 205*, 391 U.S. 563 (1968), why a city police commissioner's libel action must fail, *see New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and even why liability may not be imposed for a group boycott under the antitrust laws, *see NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). Just as the *Pickering* school board's defense was not valid under the First Amendment, the PGA's "business justification defense" was not valid under the well-established *Feist* rule that facts are part of the public domain.

Thus, it makes no difference whether plaintiff's underlying claim is based on the antitrust laws or contract law, *see, e.g.*, *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996) (contract claim). Indeed, even in *Feist* itself, the telephone company had refused to license its telephone listings because it was trying "'to extend its monopoly in telephone service to a monopoly in yellow pages advertising.'" 499 U.S. at 343 (citation omitted). The only difference from this case is that in *Feist*, the publishing company ignored the telephone directory's refusal to license and published the directory anyway. In contrast, here, Morris did not defy the terms of its press credentials, but instead, sought judicial relief for the PGA's attempt at monopoly. It would be odd, to say the least, if a news organization could not rely upon the *Feist* rule simply because the organization chose to challenge the lawfulness of the reporting ban before violating it. A newsmaker simply cannot avoid *Feist* by imposing onerous contract restrictions on the news media in an effort to maintain control over the facts otherwise in the public domain.

The court of appeals' decision thus deepens a circuit split on the ease with which private parties can circumvent the *Feist* rule. *ProCD* held that private parties can create their own version of copyright law by restricting the dissemination of factual information. 86 F.3d at 1454-55. That court believed that contract law could never protect the same type of right as copyright law, *id.*, even though the contract at issue expressly prohibited dissemination, which is precisely the "type" of right governed by copyright law. *See also Bowers v. Baystate Techs., Inc.*, 320 F.3d 1317 (Fed. Cir. 2003) (private parties may by contract protect ideas not protected under copyright law). The Fifth Circuit, on the other hand, held unenforceable a license agreement that prohibited a software producer from disassembling a computer program, because copyright law expressly authorized the adaptation of programs in certain circumstances. *See Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255, 269-70 (5th Cir. 1988).

The Eleventh Circuit's decision not only deepens the existing circuit split, but it extends it in a troubling direction. For the first time, a court has held not only that publishers can contract around the *Feist* rule, but that a newsmaker can do the same in the context of constraining press coverage. For the reasons explained below, *amici* fear that this decision will have a serious impact upon the freedom of the press in general, and on the future of online news publishing, in particular.

II. IF ALLOWED TO STAND, THE COURT OF APPEALS' DECISION WILL SUBSTANTIALLY BURDEN THE NEWS MEDIA'S FREEDOM TO PUBLISH NEWS OVER THE INTERNET.

Absent this Court's intervention, the court of appeals' decision imposes a significant threat to the news media's freedom to publish the news over the Internet. The Eleventh Circuit purported to limit its holding to the *syndication* of news, *see* Pet. App. 7a ("[T]he only real issue before us is whether the PGA's restrictions and prohibitions regarding Morris's ability to *sell* compiled real-time golf scores to third parties violates § 2 of the Sherman Act.") (emphasis in original), but its decision does not depend upon whether Morris is selling the real-time golf scores or "merely" posting them on Morris's own website. Rather, the court of appeals squarely recognized the PGA's right to restrict *any* publication of real-time golf scores before the PGA itself decides to publish them or a certain amount of time has elapsed (and the scores are thus no longer "real time"). *See* Pet. App. 3a-4a (describing PGA restrictions); *id.* at 13a n.13 (rejecting argument that "the PGA is not allowed to put restrictions on the dissemination of the compiled golf scores once they reach the media center," and holding that the "PGA has a right to control its property interest in ... the compiled golf scores").

The court of appeals' decision thus confers on newsmakers ownership over "their" newsworthy facts and makes public access to those facts contingent upon the newsmakers' willingness to disclose the facts publicly or to license the facts to another publisher. This is antithetical to our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

A. The Court Of Appeals' Decision Allows Newsmakers To Control Publication Of The News.

The advent of the Internet has frustrated countless businesses' efforts to "privatize" newsworthy facts – thereby benefiting information-hungry consumers across the United States and the world. Until now, technological advancements (and the laws that govern them) have prevented companies like the PGA from cordoning off their preferred segments of the public domain. But the court of appeals' decision threatens to undermine both technological innovation and our nation's commitment to public access to newsworthy facts.

The PGA is the latest in a long line of companies that seek to "privatize" facts that rightfully belong in the public domain. For example, the Second Circuit recently considered whether the National Basketball Association could stop a technology company from distributing basketball scores in real-time through pagers and over an Internet website on America On-Line. *See Nat'l Basketball Ass'n v. Motorola Inc.*, 105 F.3d 841 (2d Cir. 1997). A similar question almost arose during the 2000 Summer Olympics, where the International Olympic Committee ("IOC") attempted to ban Internet broadcasting of sporting events in order to avoid cannibalizing the television viewership. *See* Brandi Barnes Kellis, *A New Technology Question of Olympic Proportions*, 8 J. Intell. Prop. L. 245 (2001). While the IOC may be entitled to license broadcasting of the Olympic events, the Eleventh Circuit's decision would allow the IOC to go a step further and ban the news media from broadcasting the *results* of sporting events, at least before NBC had a chance to broadcast the events in prime time. Those facts, like the PGA's golf scores, are in the public domain as soon as the athletes finish the race. But the court of appeals' decision takes the scores out of the public domain until the newsmaker decides to put them back in.

The issues presented here go beyond the sports world. Indeed, financial markets have long recognized the importance of controlling information, and financial regulators have likewise taken affirmative efforts to make sure that information is available to all investors. From its inception almost two centuries ago, the New York Stock Exchange ("NYSE") recognized that price information could be valuable if it could be restricted to members and accordingly took steps to limit its dissemination. For example, one month after the stock exchange began operating in March 1817, the members voted to impose fines on "any member leaving the room during the calling of Stocks." This rule remained in effect, preventing members from leaking price information to nonmembers before a session was over and ensuring that each member had an equal opportunity to profit from his knowledge advantage over nonmembers. *See* Charles R. Geisst, *Wall Street: A History* 21 & n.9 (1997)); Stuart Banner, *The Origin of the New York Stock Exchange, 1791-1860*, 27 J. Legal Stud. 113, 117 n.9 & 121 (1998) (citing 1820 By-Laws, Art 3; 1833 By-Laws, Art 3; and 1856 By-Laws, Art 47); Walter Werner & Steven T. Smith, *Wall Street* 29, 31 & nn.25-28 (1991). *Cf.* Arthur Levitt, *The National Market System: A Vision that Endures,* Speech, Stanford, Cal., Jan 8, 2001, *available at* http://www.sec.gov/news/speech/spch453.htm (last visited Sept. 14, 2004) ("[In 1975, d]ominant markets held pricing data close to the vest and wielded it like a club in competition with other markets. Connections between markets were primitive or even non-existent, making it virtually impossible to access better prices in other markets – that is, if you knew they were there.").

The stock exchange continued its periodic attempts to "privatize" the facts generated by its members' trading activity until Black Tuesday and the Great Depression ushered in a new era of informational transparency on Wall Street. *See* Robert Sobel, *N.Y.S.E.: A History of the New York Stock Exchange*

1935-1975 30-45 (1975). This new transparency and the free flow of information that accompanied it has since fueled the tremendous growth in the financial markets and paid substantial dividends for consumers: "[Today, f]or less than the price of a good cup of coffee, individual investors have access for a full month to the best current prices in more than 3,000 NYSE listed securities. For about the same price, they get data for more than 4,000 Nasdaq securities." *See* Levitt, *supra.* Indeed, this transparency even contributed to the creation of the Nasdaq exchange: The SEC and the National Association of Securities Dealers (NASD) used NYSE's pricing data to identify inefficiencies in the "over-the-counter" market for securities traded outside the NYSE. They devised an automated quotation system (Nasdaq) that quickly grew into a potent competitor in the securities market. *See* Nasdaq Timeline, *available at* http://www.nasdaq.com/ newsroom/presskit/timeline.stm (last visited Sept. 14, 2004).

The experience of these financial markets demonstrates both the value of real-time information, and the importance of ensuring that such information is readily available to the public. The Eleventh Circuit's holding that the PGA can monopolize the market for its real-time golf scores with immunity is a dangerous precedent that would extend not only to the sports world, but to financial markets, and potentially even political events. As this Court has recognized, "'information respecting current events ... is a report of matters that ordinarily are *publici juris*.'" *Feist*, 499 U.S. at 353-54 (quoting *International News Serv. v. Associated Press*, 248 U.S. 215, 234 (1918)). Newsmakers like the PGA have no right to monopolize that information to the public's detriment.

B. The Court Of Appeals' Decision Will Deter Innovation On The Internet.

The court of appeals' decision will harm the public not just by restricting the open dissemination of information, but also by reducing the incentive of innovators like Morris to expand the

Internet's potential for novel and efficient ways of distributing information.

The decision below allows the PGA – and other newsmakers – to claim ownership over newsworthy facts. According to the court below, the PGA "has acted appropriately to protect its economic interests and investments," and Morris presented "the classic example of 'free riding.'" Pet. App. 17a-18a.

Justice Breyer, however, convincingly rebutted this logic more than thirty years ago, when he argued that claims of "free riding" are often efforts to maintain supra-competitive prices and to deaden innovation. *See* Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 Harv. L. Rev. 281, 321, 347 (1970); *see also* Lawrence Lessig, *The Future of Ideas: The Fate of the Commons in a Connected World* 176 (2001) ("Dinosaurs should die. This lesson we have learned over and over again. And innovators should resist efforts by dinosaurs to keep control. Not because dinosaurs are evil; not because they can't change; but because the greatest innovation will come from those outside these old institutions.").

Far from a free rider, Morris Communications was the first media company to publish complete, real-time golf scores on the Internet. Pet. 4. Rather than attempting to compete and innovate on the merits, the PGA opted instead to monopolize the market Morris created by controlling the supply of newsworthy facts.

The PGA has no ownership rights over the facts produced at its events, and therefore it has no right to prevent others from disseminating that information. If the PGA can get away with monopolizing this information, then it will deter future innovators like Morris, from seeking to invest in developing the possibilities that the Internet offers to the efficient distribution of information. As with other monopolies, it is the public who will ultimately suffer from these restrictions on innovation.

CONCLUSION

This Court should grant the petition for writ of *certiorari* and set the case for full briefing and oral argument.

Respectfully submitted,

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